CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 474

THE UNITED STATES OF AMERICA, APPELLANT

vs.

JOSEPH L. CARBONE, VINCENT DiNUNNO, JOHN STROPPARO AND WANTEE HUHTANIEMI

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

FILED OCTOBER 1, 1945

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673853—45——1

1 In the District Court of the United States, District of Massachusetts

No. 16568, Criminal Docket

THE UNITED STATES OF AMERICA, BY INDICTMENT

v.

JOSEPH L. CARBONE, VINCENT DI NUNNO, JOHN STROPPARO, AND WANTEE HUHTANIEMI

Indictment

Returned and filed March 17, 1944

At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said District, on the third Tuesday of December in the year of our Lord one thousand nine hundred and forty-three.

The Jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that Joseph L. Carbone, John Stropparo, and Wantee Huhtaniemi, each of Fitchburg, Massachusetts, and Vincent Di Nunno of Boston, Massachusetts, did, at Fort Devens and at other places within the Commonwealth of Massachusetts to the Grand Jurors unknown, from the first of October 1940 to the thirtieth of March 1941, unlawfully and feloniously, and continuously conspire together, and with others to the Grand Jurors unknown, to commit an offense against the United States, to wit, to induce certain persons employed in the construction of certain public buildings and public works financed in whole by grants from the United States to give up a part of the compensation to which they
2 were entitled under their contracts of employment by force, intimidation, threat of procuring dismissal from such employment and by other means, in the following manner, to wit:

During the period of the alleged conspiracy, Coleman Bros. Corp. and John Bowen, Inc., each being a corporation, and hereafter referred to as the contractors, were engaged jointly in the construction of various public buildings for the United States at the said Fort Devens, pursuant to a contract dated September 9, 1940, between them and the United States, by which the contractors agreed to furnish the materials, equipment, and labor for the said construction, and by which the United States agreed to reimburse them for all such expenditures and in addition to pay them a fixed fee, and in the course of the said construction it became necessary for the contractors to employ about seventy-five hundred laborers, the exact number being to the Grand Jurors unknown;

And the said Joseph L. Carbone, who was then and there president of Local 39 of the International Hod Carriers' Building and Common Laborers' Union of America (which in September of 1940 had about one hundred members), and the said John Stropparo, who was then and there treasurer of the said Local, and the said Wantee Huhtaniemi, who was then and there financial secretary of the said Local, and the said Vincent Di Nunno who was then and there president of the Eastern Massachusetts Laborers District Council but was employed by the said Local 39, and who are hereafter described as the defendants, on or about October 16, 1940, made an agreement with the contractors, by virtue of their aforesaid positions, and connections with the said Local by which the contractors undertook to employ as laborers on the said construction only those who were approved by the defendants and to discharge any of those thus employed at the request of the defendants, and to employ and pay forty persons named by the defendants, known as stewards, who were to perform such duties as the defendants should direct, and to provide an office for the defendants on the site of the said construction;

And the defendants thereupon approved to the contractors for employment as laborers in the said construction, only such persons as were already members of said Local 39, or some other
3 local of the aforesaid International Union, and only such other persons as paid to the defendants the sum of five dollars. To such persons paying them five dollars, the defendants gave a receipt in the following form, to wit:

INTERNATIONAL LABORERS' UNION LOCAL 39, 304 Main St., Fitchburg, Mass.

No. ---------- Date ----------

Received of Mr. ----------

$5 cents— Total ----------

J. L. CARBONE,
Business Representative.

This receipt is good for one week from date.

And the defendants represented to the persons paying the five dollars that it would be regarded as an installment upon an initiation fee into said Local, and International Union (which fee was at first fifty dollars, then forty dollars, and thereafter twenty-five dollars), and that five dollars must be paid to them each week until the total initiation fee was paid, or the person would not be permitted to continue work upon the said construction;

And the defendants directed the said stewards each week to go among the laborers in the said construction and to inquire of each, who could not show membership in the said Local or International Union, whether he had a receipt showing that he had paid

five dollars for that current week, and if he did not have such a receipt, to demand from him that he pay the said five dollars to the defendants, or to them, immediately, under threat of procuring his dismissal from his employment if he did not pay the five dollars; which threat the defendants were able to carry out by reason of their aforesaid agreement with the contractors, the defendants well knowing, and intending, that the laborers would pay the said five dollars out of the compensation to which they were entitled under their contracts of employment with the said contractors;

And the defendants kept no records of the persons who had paid the five dollars to them, or to the stewards for them, either for the initial week or for subsequent weeks, except only that if a laborer should present to them receipts showing that he had paid the full amount of the initiation fee, then the defendants re-
4 corded his name and sent it to the headquarters of the International Hod Carriers, Building and Common Laborers' Union in Washington, D. C., with the sum of five dollars and thirty-five cents, which was that part of the initiation fee to which the International Union according to its rules was entitled:

And the defendants made no report to the Local 39, or to anyone, of the amount they had received from laborers paying less than the full initiation fee as aforesaid, or the total sums they had collected in this way, nor did they cause any of the sums collected in this way and received by them to be recorded in the Financial Secretary's book as the rules of the said International Union require: The defendants well knowing that the majority of those who paid the initial five dollars would not and did not complete payment of the full initiation fee;

And in all this the defendants acted in agreement, each aiding and abetting the other, and in this way induced the said workers to give up a part of the compensation to which they were entitled under their contract, representing always they they were acting for the said Local 39 and the International Union, but nevertheless concealing from the said Local 39 and the International Union the sums they collected as aforesaid from all persons who did not pay the full initiation fee, and transmitting to the Headquarters of the International Union for recording as members of the International Union, the names of only those laborers who could prove that they had paid the full initiation fee.

And in order to effect the object of the said unlawful and felonious conspiracy, the defendants did among others, the following overt acts, to wit:

1. On March 18, 1941, at Fitchburg, Massachusetts, the said Vincent Di Nunno attended a meeting of the said Local 39.

2. On October 16, 1940, the defendant Vincent Di Nunno went to the said Fort Devens.

3. On November 20, 1940, the defendants Joseph L. Carbone, John Stropparo and Wantee Huhtaniemi rented a safe deposit box in the Safety Fund National Bank in the said Fitchburg.

4. During the period of the conspiracy, the defendants maintained an office at the said Fort Devens, near the place where the said laborers were paid their weekly wages.

5. On or about December 1, 1940, at the said Fort Devens, the defendant Vincent Di Nunno asked John W. King, superintendent for the contractors, for a list of the laborers employed in the said construction.

6. At the said Fitchburg during and throughout the months of October, November, and December 1940, and January, February, and March 1941, the said John Stropparo and the said Wantee Hughtaniemi concealed from the members of said Local and from the officials of the International Union, the amounts collected from the laborers as aforesaid by not recording the sums thus collected, the amount of which is to the Grand Jurors unknown, in the Financial Secretary's Day Book provided for that purpose.

7. From November 20, 1940 to March 25, 1941, the defendants Joseph L. Carbone, John Stropparo and Wantee Hughtaniemi kept in a safe deposit box in the Safety Fund National Bank at the said Fitchburg, a sum of money, the amount of which is to the Grand Jurors unknown, which they had collected from the laborers in the aforesaid manner.

8. On March 28, 1941, the defendants Joseph L. Carbone and John Stropparo drew a check in favor of A. Persion on the Safety Fund National Bank, Fitchburg, Massachusetts, in the sum of four hundred sixty-four dollars and eighty-five cents.

9. During the period of the said conspiracy, the defendants collected from the said laborers in the aforesaid manner, certain sums of money, the amount of which is to the Grand Jurors unknown and sent to the Headquarters of the International Union at Washington, D. C. at various times therein, a total of $6,388.09, the last amount being sent on March 28, 1941.

Against the Peace and Dignity of the United States and of the statutes in such cases made and provided.

AMOS W. W. WOODCOCK,
Special Assistant to the Attorney General.

Section 276 (b), Title 40, U. S. C. A.
Sec. 88, Title 18, U. S. C. A.

PHILIP W. MORROW,
Foreman of the Grand Jury.

EDWARD D. HASSAN,
Asst. United States Attorney for the District of Massachusetts.

District of Massachusetts

March 19, 1944

Returned into the District Court by the Grand Jurors and filed.

ARTHUR M. BROWN,
Deputy Clerk.

This indictment was presented by the grand jury at the December Term of this court, A. D. 1943, on March 17, 1944.

In United States District Court

Motion of Defendant, Vincent Di Nunno, to dismiss

Filed April 6, 1944

And now comes the Defendant herein and says that the Indictment herein, and each and every count thereof, is not sufficient in law, to require the defendant to plead thereto, and, therefore, moves the Court to dismiss the indictment and each and every count thereof, and, for special reasons, shows unto the Court the following:

1. That there is pending against the Defendant a previous indictment which contains in substance allegations which propose to set out an offence charged again in this indictment.

2. That the present indictment, upon which the defendant has not been arraigned, was returned against the defendant on March 17, 1944, by the Grand Jury within and for this District, pending consideration by the Court of a Motion filed by the Government, seeking to vacate its order by reason of the decision rendered by the United States Supreme Court in the case of United States v. Laudani, Opinion dated January 3, 1944.

7 3. That the offence as set out in the allegations of this indictment, fails to clearly set forth the interpretation of Section 276b, of Title 40, in the United States Code, with relation to the word "whoever" and "contract of employment," under the Laudani decision.

4. That the allegations contained in the indictment fail to set forth that the defendant was vested with authority to fix and terminate the employer-employee status.

5. That the allegations in this indictment set forth that the defendant was President of the Eastern Massachusetts Laborers District Council of the International Hod Carriers Building & Common Laborers Union of America, and that he, with others, accused in the same indictment are officials of the Union under

an agreement with the contractor, with having the "power to approve the employment," and the "power to request the discharge of workers." This allegation fails of sufficiency to set forth a legal offence consistent with the interpretation of Section 276b, Title 40, United States Code, by the United States Supreme Court, with relation to "contract of employment" and the authority required to be alleged "to hire and discharge an employee", in the Laudani case.

By his Attorneys,

(Signed) MICHAEL CARCHIA.
WALTER F. LEWIS.

In United States District Court

Motion of Defendant, Joseph L. Carbone, to dismiss

Filed April 18, 1944

And now comes the defendant herein and says that the Indictment herein, and each and every count thereof, is not sufficient in law to require the defendant to plead thereto, and, therefore, moves the Court to dismiss the indictment and each and every count thereof, and, for special reasons, shows unto the Court the following:—

1. That there is pending against the defendant a previous indictment which contains in substance allegations which propose to set out an offence charged again in this indictment.

2. That the present indictment, upon which the defendant has not been arraigned, was returned against the defendant on March 17, 1944, by the Grand Jury within and for this District, pending consideration by the Court of a Motion filed by the Government, seeking to vacate its order by reason of the decision rendered by the United States Supreme Court in the case of United States v. Laudani, Opinion dated January 3, 1944.

That the offence as set out in the allegations of this indictment, fails to clearly set forth the interpretation of Section 276b, of Title 40, in the United States Code, with relation to the word "whoever" and "contract of employment," under the Laudani decision.

4. That the allegations contained in the indictment fail to set forth that the defendant was vested with authority to fix and terminate the employer-employee status.

5. That the allegations in this indictment set forth that the defendant was then and there President of Local 39 of the International Hod Carriers' Building and Common Laborers' Union of

America, and that he, with others, accused in the same indictment are officials of the Union under an agreement with the contractor, with having the "power to approve the employment," and the "power to request the discharge of workers." This allegation fails of sufficiency to set forth a legal offence consistent with the interpretation of Section 276b, Title 40, United States Code, by the United States Supreme Court, with relation to "contract of employment" and the authority required to be alleged "to hire and discharge an employee" in the Laudani case.

By his attorney,

(Signed) WILLIAM M. [illegible]

In United States District Court

Motion of Defendant John Stropparo, to dismiss

Filed April 18, 1944

And now comes the defendant herein and says that the indictment herein, and each and every count thereof, is not sufficient in law, to require the defendant to plead thereto, and, therefore, moves the Court to dismiss the indictment and each and every count thereof, and, for special reasons, shows unto the Court the following:

1. That there is pending against the defendant a previous indictment which contains in substance allegations which propose to set out an offence charged again in this indictment.

2. That the present indictment, upon which the defendant has not been arraigned, was returned against the defendant on March 17, 1944, by the Grand Jury within and for this District, pending consideration by the Court of a Motion filed by the Government, seeking to vacate its order by reason of the decision rendered by the United States Supreme Court in the case of United States v. Laudani, Opinion dated January 3, 1944.

3. That the offence as set out in the allegations of this indictment, fails to clearly set forth the interpretation of Section 276b, of Title 40, in the United States Code, with relation to the words "whoever" and "contract of employment," under the Laudani decision.

4. That the allegations contained in the indictment fail to set forth that the defendant was vested with authority to fix and terminate the employer-employee status.

5. That the allegations in this indictment set forth that the defendant was then and there Treasurer of Local 29 of the International Hod Carriers' Building and Common Laborers' Union of America, and that he, with others, accused in the same indictment

are officials of the Union under an agreement with the contractor, with having the "power to approve the employment," and the "power to request the discharge of workers." This allegation fails of sufficiency to set forth a legal offence consistent with the interpretation of Section 276b, Title 40, United States Code, by the United States Supreme Court, with relation to "contract of employment" and the authority required to be alleged "to hire and discharge an employee" in the Laudani case.

10 By his Attorney,

(Signed) WILLIAM M. QUADE.

In United States District Court

Motion of Defendant, Wantee Huhtaniemi, to dismiss

Filed April 18, 1944

And now comes the defendant herein and says that the Indictment herein, and each and every count thereof, is not sufficient in law, to require the defendant to plead thereto, and, therefore, moves the Court to dismiss the indictment and each and every count thereof, and, for special reasons, shows unto the Court the following:

1. That there is pending against the defendant a previous indictment which contains in substance allegations which propose to set out an offence charged again in this indictment.

2. That the present indictment, upon which the defendant has not been arraigned, was returned against the defendant on March 17, 1944, by the Grand Jury within and for this District, pending consideration by the Court of a Motion filed by the Government, seeking to vacate its order by reason of the decision rendered by the United States Supreme Court in the case of United States v. Laudani, Opinion dated January 3, 1944.

3. That the offence as set out in the allegations of this indictment, fails to clearly set forth the interpretation of Section 276b, of Title 40, in the United States Code, with relation to the word "whoever" and "contract of employment," under the Laudani decision.

4. That the allegations contained in the indictment fail to set forth that the defendant was vested with authority to fix and terminate the employer-employee status.

5. That the allegations in this indictment set forth that the defendant was then and there Financial Secretary of Local

11 39 of the International Hod Carriers' Building and Common Laborers' Union of America, and that he, with others, accused in the same indictment are officials of the Union under an agreement with the contractor, with having the "power to

approve the employment," and the "power to request the discharge of workers." This allegation fails of sufficiency to set forth a legal offence consistent with the interpretation of Section 276b, Title 40, United States Code, by the United States Supreme Court, with relation to "contract of employment" and the authority required to be alleged "to hire and discharge an employee" in the Laudani case.

By his Attorney,

(Signed) WILLIAM M. QUADE.

At the same term, on June 19, 1945, the cause came on for hearing on the foregoing motions to dismiss, the Honorable George C. Sweeney, District Judge, sitting, and was taken under advisement.

12 In United States District Court

Opinion

August 1, 1945

SWEENEY, J. This is an indictment for conspiracy to violate Section 1 of the so-called "Kickback" Act.[1] 48 Stat. 948; 40 U. S. C. A., Sec. 276b. To this indictment the defendants have filed motions to dismiss on the ground that the indictment does not state an offense cognizable in law. Another indictment was returned against these defendants over a year ago, and demurrers and motions to quash were sustained and allowed. United States v. Carbone et al., 56 F. Supp. 343.

At the time the alleged conspiracy occurred three of the defendants were officers of Local 39 of the International Hod Carriers' Building and Common Laborers' Union of America. The fourth defendant was employed by Local 39.

The indictment charges that, during the period of the alleged conspiracy, Coleman Bros., Inc. and John Bowen, Inc. were engaged in the construction of various public buildings for the United States at Fort Devens, Massachusetts, on a cost plus fixed fee contract, the contractors to furnish the materials, equipment and labor for the job; the defendants, by virtue of their
13 positions in Local 39, made an agreement with the contractors under which the contractors undertook to employ as laborers on the job only those who were approved by the defendants, and to discharge any of those thus employed at the request

[1] Section 1 provides that, "Whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both."

of the defendants; the defendants approved to the contractors only members of the Union or such persons as paid to the defendants the sum of five dollars; the continued approval of the defendants was conditioned upon the payment of five dollars per week until the full amount of the initiation fee into Local 39 and the International Union had been paid; the defendants threatened to procure the discharge of any workers who failed to make the required payments; the defendants knew and intended that the workers would make the payments out of compensation earned.

In United States v. Landani, 320 U. S. 543, a foreman, who had been vested by his employer with power to hire and discharge workers, was held to be indictable under Section 1 of the Kickback Act. In the course of the opinion the Court indicated the guides to be used in the interpretation of this section. Limitations were placed upon the broad scope of the literal meaning of "Whoever" in the statutory text. The essential element which would bring a defendant within the operation of Section 1 was inferred to be an allegation that he had been "vested by the employer with power to fix and terminate the employer-employee status." The position of the foreman in the Landani case in this regard is clear. It does not follow that these union officials similarly were vested with power to hire and fire. It is true that they could demand the exclusion of any worker who refused to meet the union requirements. However, this constitutes, not a delegation of the employer's authority, but a power founded upon a contractual obligation created by a collective bargaining agreement. These defendants do not stand in the shoes of the contractors; they represent an adverse interest.

14 I do not believe that either the history or the purpose of the Kick-back legislation warrants an extension of its scope to include these defendants. Language from the Senate Report quoted by Mr. Justice Black in the Landani case to support the inclusion of foremen, serves equally to support the exclusion of union officials. The closed shop is within the legitimate objectives of trade unionism. Implementation of this objective by the means used by these defendants should not expose them to the risk of criminal prosecution.

I am aware that there are decisions in other districts at variance with the views here expressed. United States v. Fuller, et al., 51 F. Supp. 953; United States v. Lombard, et al., 54 F. Supp. 507. However, I do not believe that they have reached the proper result.

The motions to dismiss the indictment are allowed.

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[2] Mr. Justice Black stated that hearings before the Senate Committee on the Judiciary "had revealed 'that large sums of money have been extracted from the pockets of American labor to enrich the contractors, subcontractors, and their officials.'" United States v. Landani, supra, p. 548.

15 In United States District Court

Petition for appeal

Filed August 30, 1945

Comes now the United States of America, plaintiff herein, and states that on the first day of August 1945, the District Court of the United States for the District of Massachusetts allowed motions to dismiss the indictment herein, and the United States of America, feeling aggrieved at the ruling of said District Court in allowing said motions to dismiss, prays that it may be allowed an appeal to the Supreme Court of the United States for reversal of said judgment and order, and that a transcript of record in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA,
(Signed) EDMUND J. BRANDON,
United States Attorney,
District of Massachusetts.

In United States District Court

Order allowing appeal to the Supreme Court of the United States

August 30, 1945

This cause having come on this day before the Court on petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for reversal of the judgment in this cause allowing motions to dismiss the indictment, and that a duly certified copy of the record in said cause be

16 transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered such petition, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the Court, ordered and adjudged that the plaintiff herein, the United States of America, be, and it is hereby allowed an appeal from the order and judgment of this Court allowing Motions to Dismiss the indictment, to the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court.

It is further ordered that the United States of America be, and it is hereby, permitted a period of forty days in which to file and docket the said appeal in the Supreme Court of the United States.

Dated at Boston, Massachusetts, this 30th day of August, 1945.

By the Court:

(Signed) CHARLES E. WYZANSKI, Jr.,
United States District Judge.

(In absence of SWEENEY, J.)

In United States District Court

Assignment of errors

Filed August 30, 1945

Comes now the United States of America, by Edmund J. Brandon, United States Attorney for the District of Massachusetts, and avers that in the record proceedings and judgment herein there is manifest error and against the just rights of the said plaintiff in this, to wit:

1. That the Court erred in granting the motions to dismiss the indictment.

2. That the Court erred in holding that the indictment does not state an offense cognizable in law.

17 3. That the Court erred in holding that the so-called Kickback Act, 48 Stat. 948, 40 U. S. C. 276b, applies only to employers or persons acting directly as their agents in exercising the power to employ and discharge employees.

4. That the Court erred in holding that union officials are ipso facto immune from prosecution under the Kickback Act even though, under color of union activity, they induce a person engaged on a federal project to give up part of his compensation for the personal enrichment of such officials.

(Signed) EDMUND J. BRANDON,
United States Attorney,
District of Massachusetts.

18 [Citation in usual form showing service on William M. Quade and Michael Carchia omitted in printing.]

19 In United States District Court

Praecipe for transcript of record

Filed August 30, 1945

To the Clerk, United States District Court
for the District of Massachusetts:

The appellant hereby directs that in preparing the transcript of the record in this cause in the United States District Court for the District of Massachusetts, in connection with its appeal to the Supreme Court of the United States, you include the following:

1. Docket entries and minute entries showing return of indictment, filing of Motions to Dismiss, and entry of order and judgment allowing Motions to Dismiss.
2. Indictment.
3. Motions to Dismiss.
4. Opinion allowing Motions to Dismiss.
5. Order allowing Motions to Dismiss and dismissing indictment.
6. Petition for Appeal to the Supreme Court.
7. Statement as to jurisdiction of the Supreme Court.
8. Assignment of errors.
9. Order allowing appeal.
10. Notice of service on appellees of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.
11. Citation.
12. Praecipe.

(Signed) EDMUND J. BRANDON,
United States Attorney,
District of Massachusetts.

Service of the foregoing Praecipe for Transcript of Record is acknowledged this 30th day of August 1945.

(Signed) WILLIAM M. QUADE,
Attorney for Joseph L. Carbone,
Wantee Huhtaniemi and John Stropparo.
(Signed) MICHAEL CARCHIA,
Attorney for Vincent DiNunno.

20 In United States District Court

Motion as to final judgment and order thereon

September 26, 1945

Now comes the United States of America through Edmund J. Brandon, United States Attorney for the District of Massachusetts, and respectfully moves that this Honorable Court enter an order certifying that the docket entries in the above-captioned matter constitute and represent the final judgment of this Court upon the demurrers filed by the defendants or, in the alternative, respectfully requests this Court to cause an entry to be made upon the docket in said case of a formal judgment.

EDMUND J. BRANDON,
United States Attorney.
By Edward D. Hassan,
EDWARD D. HASSAN,
Assistant United States Attorney.

Denied, because not conforming to the practice in this District.
GEORGE C. SWEENEY,
U. S. D. Judge.

21 In United States District Court

Docket entries

1944

Mar. 17—Indictment returned.
Apr. 6—Motion to dismiss filed by deft. Vincent DiNunno.
Apr. 18—Motion to dismiss filed by deft. Carbone.
Apr. 18—Motion to dismiss filed by deft. Huhtaniemi.
Apr. 18—Motion to dismiss filed by deft. Stropparo.
June 19—Sweeney, J. Hearing on motions to dismiss; taken under advisement.

1945

Aug. 1—Sweeney, J. Opinion dated August 1, 1945 received and filed. "Motions to dismiss the indictment are allowed."
Aug. 1—Sweeney, J. Motions to dismiss indictment allowed.
Aug. 30—Petition for Appeal to Supreme Court of the United States filed by United States.

Aug. 30—Wyzanski, J. (in absence of Sweeney, J.) Order allowing appeal to Supreme Court.
Aug. 30—Wyzanski, J. Citation issued, returnable October 9th, 1945 (40 days).
Aug. 30—Praecipe filed by United States.
Aug. 30—Assignment of Errors filed by United States.
Aug. 30—Statement to defendants under Rule 12, par. 3 filed.
Aug. 30—Statement as to jurisdiction filed by United States.
Sept. 12—Statement against Jurisdiction and Motion to Dismiss Appeal filed by defendants.
Sept. 12—Affidavit of Service filed by United States Marshal.
Sept. 12—Affidavit of Service filed by United States Marshal.
Sept. 26—Motion for Entry of Formal Judgment filed by United States Attorney.
Sept. 26—Sweeney, J. Motion for Entry of Formal Judgment filed by United States Attorney denied because not conforming to the practice in this District.

22 [Clerk's certificate to foregoing transcript omitted in printing.]

23 In the Supreme Court of the United States

Statement of points to be relied upon and designation of record

Filed Oct. 11, 1945

Pursuant to Rule XIII, paragraph 9 of this Court, appellant states that it intends to rely upon all of the points in its assignments of error.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for the consideration of the points relied upon.

HAROLD JUDSON,
Acting Solicitor General.

Service of the above Statement of Points and Designation of Record acknowledged this 7 day of October 1945.

WILLIAM M. QUADE,
Counsel for Appellee.

[File endorsement omitted.]

24 Supreme Court of the United States

Order noting probable jurisdiction

November 5, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Mr. Justice JACKSON took no part in the consideration of this question.

[Endorsement on cover:] File No. 50177. Massachusetts D. C. U. S. Term No. 474. The United States of America, Appellant vs. Joseph L. Carbone, Vincent Di Nunno, John Stropparo and Wantee Huhtaniemi. Filed October 1, 1945. Term No. 474 O. T. 1945.

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CLERK

No. 474

In the Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH L. CARBONE, VINCENT DINUCCIO, JOHN STROPPARO, AND WALTER HUNTASSERI

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT AS TO JURISDICTION

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 474

THE UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH L. CARBONE, VINCENT DINUNNO, JOHN STROPPARO, AND WANTEE HUHTANEMI

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT AS TO JURISDICTION

(Filed August 30, 1945)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on August 1, 1945. The petition for appeal was filed on August 30, 1945, and is presented to the District Court herewith, to wit, on the thirtieth day of August 1945.

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JURISDICTION

The jurisdiction of the Supreme Court to review by further appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. IV, 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, 28 U. S. C. 345.

STATUTE INVOLVED

Section 1 of the Act of June 13, 1934, c. 482, 48 Stat. 948, 40 U. S. C. 276b, commonly called the Kickback Act, provides:

> That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

THE ISSUE AND THE RULING BELOW

The defendant—Joseph L. Carbone, Wanrer Hultaniemi, John Stropparo, president, financial secretary, and treasurer, respectively, of Local 39 of the International Hod Carriers' Building

and Common Laborers Union of America, and Vincent DeNunno, president of the Eastern Massachusetts Laborers District Council and an employee of Local 39—who, by virtue of their positions and connections with the Local, made a scheme hereinafter described below with two contractors engaged jointly in the construction of various public buildings for the United States at Fort Devens, Massachusetts, were indicted on March 17, 1941, for conspiracy to violate the Kickback Act by inducing certain persons employed in the construction of such public buildings, financed in whole by grants from the United States, to give up part of the compensation to which they were entitled under their contracts of employment, by force, intimidation, threat of procuring dismissal from such employment, and by other means. The details of the conspiracy, which is alleged to have continued from October 1, 1940, to March 31, 1941, are set forth in the indictment as follows:

On October 16, 1940, about one month after the signing of the contract for the construction at Fort Devens, Massachusetts, the defendants made an agreement with the contractors whereby the latter undertook to employ as laborers only such persons as were approved by the defendants and to discharge any such employees at their request. The contractors also agreed to employ forty persons named by the defendants, known as stewards, who were to perform such duties as the

defendants should direct, and to provide an office for the defendants on the site of the construction. Approximately 7,500 laborers were employed by the contractors in the course of such construction. Following this agreement, the defendants approved to the contractors for employment as laborers only members of Local 39, which, in September 1940, had about 100 members, or of other locals of the International Union, and only such other persons as paid to the defendants the sum of $5.00. The defendants represented to the latter that this payment would be regarded as an installment upon the initiation fee of Local 39 and the International Union and that each such employee would be required to pay the defendants $5.00 per week until the total initiation fee was paid or he would not be permitted to continue to work.[1] The form of receipt given to the laborers for the initial and subsequent weekly payments was in the name of Local 39, by defendant Carbone as "Business Representative," and contained spaces for the date and total amount paid by the individual. The form recited: "This receipt is good for one week from date." Each week the defendants directed the stewards to go among the laborers and demand of each non-member of the union either that he display a receipt showing that he had paid $5.00 for the current week or that he immediately pay such sum to the steward

[1] The initiation fee was originally $50.00, but it was later reduced to $40.00 and then to $25.00.

or the defendants under threat of procuring the laborer's dismissal from employment if he did not do so. The defendants were able to carry out this threat by reason of their agreement with the contractors, and they knew and intended that the laborers would pay the $5.00 weekly payments out of the compensation to which they were entitled by virtue of their employment.

The defendants kept no records of these payments to them, except that if a laborer should present receipts showing payment of the initiation fee in full, his name was recorded and sent to the headquarters of the International Union with the sum of $5.35, representing the share of the fee to which the International was entitled under its rules. Neither did the defendants report to Local 39 or to any one the amounts received from laborers paying less than the full amount of the initiation fee, nor did they cause such sums to be recorded in the Financial Secretary's books as the rules of the International required. The defendants knew that the majority of the laborers who paid the initial sum of $5.00 would not and did not complete payment of the full initiation fee. In all these transactions whereby the defendant, acting in agreement, induced the laborers to give up part of the compensation to which they were entitled, they represented that they were acting for Local 39 and the International, at the same time concealing from those organizations the sums they thus col-

lected from laborers who did not pay the initiation fee in full.

The defendants filed motions to dismiss the indictment on the ground that it does not state an offense cognizable in law.

In granting the motions to dismiss, the District Court held that the Kickback Act applies only to employers or those "vested by the employer with power to fix and terminate the employer-employee status"; that the power of union officials to demand the discharge of any worker who refuses to meet union requirements is "not a delegation of the employers' authority, but a power founded upon a contractual obligation created by a collective bargaining agreement"; that neither the history nor the purpose of the Kickback legislation "warrants an extension of its scope to include these defendants." The Court thus construed the Kickback Act as not embracing the activities of union officials who use their power to exclude persons from employment as a means of personal enrichment.

Since the District Court ruled that the facts alleged in the indictment do not fall within the purview of the Kickback Act, the Court construed the statute, and the ruling is subject to review by the Supreme Court on direct appeal. *United States* v. *Lepowitch*, 318 U. S. 702, 703; *United States* v. *Classic*, 313 U. S. 299, 309; *United States* v. *Kapp*, 302 U. S. 214, 217; *United States*

v. *Birdsall*, 233 U. S. 223, 230; *United States* v. *Mescall*, 215 U. S. 26, 31; *United States* v. *Kettel*, 211 U. S. 370.

THE QUESTION IS SUBSTANTIAL

The decision of the district court in effect holds that union officials are *ipso facto* immune from prosecution under the Kickback Act, even though, under color of union activity, they induce a person engaged upon a federal project to give up part of his compensation, not for union purposes, but for the personal enrichment of such officials. The importance of this question to large numbers of laborers engaged in the federally financed public construction programs is obvious. We submit that the construction given to the statute by the district court is inconsistent with its language and with the principles enunciated by the Supreme Court and lower federal courts.

1. The indictment alleges that the contractors entered into an agreement with defendants whereby "the contractors undertook to employ as laborers on said construction only those who were approved by the defendants and to discharge any of those thus employed at the request of the defendants." The indictment therefore alleges in substance that the employers delegated to the defendants their own authority to make controlling decisions in respect of employment. Defendants were thus in much the same position as the fore-

man held subject to the Act in *United States* v. *Laudani*, 320 U. S. 543. Substantially similar indictments have been sustained on such theory in *United States* v. *Fuller*, 51 F. Supp. 951 (N. D. N. Y.), and *United States* v. *Lombard*, 54 F. Supp. 537 (W. D. N. Y.).

2. We do not believe that the *Laudani* decision, *supra*, has the effect, which the district court accorded to it, of limiting the statute solely to employers or persons acting directly as their agents. The language of the statute punishing "whoever" exacts a kickback "by threat of procuring dismissal" from employment, "or by any other manner whatsoever," indicates a broader sweep. We think that the statute requires at most a direct relationship between the employment and the exaction of compensation by illegal means. Such a direct relationship was clearly averred by the allegations of the indictment that, if a worker did not show membership in the union or a receipt showing the payment of $5.00 for the current week, the payment would be demanded "under threat of procuring dismissal from his employment if he did not pay the five dollars; which threat the defendants were able to carry out by reason of their * * * agreement with the contractors, the defendants well knowing and intending that the laborers would pay the said five dollars out of the compensation to which they are entitled under their contracts of employment with the said contractor."

3. In its opinion the district court stated: "The closed shop is within the legitimate objectives of trade unionism. Implementation of this objective by the means used by these defendants should not expose them to the risk of criminal prosecution." The indictment makes it clear, however, that the prosecution is not based on legitimate closed shop activities. It specifically alleges:

> And the defendants made no report to the Local 39, or to any one, of the amount they had received from laborers paying less than the full initiation fee as aforesaid, or the total sums they had collected in this way, nor did they cause any of the sums collected in this way and received by them to be recorded in the Financial Secretary's book as the rules of the said International Union required;—the defendants well knowing that the majority of those who paid the initial five dollars would not and did not complete the payment of the full initiation fee.

The gist of the offense here charged is that defendants were using an apparently legitimate device as a means of extorting kickbacks from persons employed on Federal projects. Proper labor union activities having the protection of federal legislation are manifestly not federal crimes, but a coloring of union activity does not, we submit, grant immunity to persons who commit acts specifically condemned by the statute

not for union purposes, but for their own personal enrichment. Cf. *Nick* v. *United States*, 122 F. 2d 660, 669–670 (C. C. A. 8), certiorari denied, 314 U. S. 687, rehearing denied, 314 U. S. 715, where union officials acting for personal gain were convinced under the Federal Anti-racketeering Act (18 U. S. C. 420), despite the specific provision of that Act excluding from its scope bona fide labor activities.

Appended hereto is a copy of the opinion of the District Court entered on August 1, 1945.

Respectfully submitted.

(Signed) HAROLD Judson,
Acting Solicitor General.

(Signed) EDMUND J. BRANDON,
United States Attorney for the District of Massachusetts.

APPENDIX

OPINION

August 1, 1945

SWEENEY, *J.* This is an indictment for conspiracy to violate Section 1 of the so-called "Kickback" Act,[1] 48 Stat. 948; 40 U. S. C. A., Sec. 276b. To this indictment the defendants have filed motions to dismiss on the ground that the indictment does not state an offense cognizable in law. Another indictment was returned against these defendants over a year ago, and demurrers and motions to quash were sustained and allowed. *United States* v. *Carbone, et al,* 56 F. Sup. 343.

At the time the alleged conspiracy occurred three of the defendants were officers of Local 39 of the International Hod Carriers' Building and Common Laborers' Union of America. The fourth defendant was employed by Local 39.

[1] Section 1 provides that, "Whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both."

The indictment charges that, during the period of the alleged conspiracy, Coleman Bros., Inc. and John Bowen, Inc. were engaged in the construction of various public buildings for the United States at Fort Devens, Massachusetts, on a cost plus fixed fee contract, the contractors to furnish the materials, equipment and labor for the job; the defendants, by virtue of their positions in Local 39, made an agreement with the contractors under which the contractors undertook to employ as laborers on the job only those who were approved by the defendants, and to discharge any of those thus employed at the request of the defendants; the defendants approved to the contractors only members of the Union or such persons as paid to the defendants the sum of five dollars; the continued approval of the defendants was conditioned upon the payment of five dollars per week until the full amount of the initiation fee into Local 39 and the International Union had been paid; the defendants threatened to procure the discharge of any workers who failed to make the required payments; the defendants knew and intended that the workers would make the payments out of compensation earned.

In *United States* v. *Laudani*, 320 U. S. 543, a foreman, who had been vested by his employer with power to hire and discharge workers, was held to be indictable under Section 1 of the Kickback Act. In the course of the opinion the Court indicated the guides to be used in the interpretation of this section. Limitations were placed upon the broad scope of the literal meaning of "Whoever" in the statutory text. The essential

element which would bring a defendant within the operation of Section 1 was inferred to be an allegation that he had been "vested by the employer with power to fix and terminate the employer-employee status." The position of the foreman in the *Laudani* case in this regard is clear. It does not follow that these union officials similarly were vested with power to hire and fire. It is true that they could demand the exclusion of any worker who refused to meet the union requirements. However this constitutes, not a delegation of the employers' authority, but a power founded upon a contractual obligation created by a collective bargaining agreement. These defendants do not stand in the shoes of the contractors; they represent an adverse interest.

I do not believe that either the history or the purpose of the Kickback legislation warrants an extension of its scope to include these defendants. Language from the Senate Report[2] quoted by Mr. Justice Black in the *Laudani* case to support the inclusion of foremen, serves equally to support the exclusion of union officials. The closed shop is within the legitimate objectives of trade unionism. Implementation of this objective by the means used by these defendants should not expose them to the risk of criminal prosecution.

I am aware that there are decisions in other districts at variance with the views here ex-

[2] Mr. Justice Black stated that hearings before the Senate Committee on the Judiciary "had revealed 'that large sums of money have been extracted from the pockets of American labor to enrich contractors, subcontractors, and their officials'." *United States* v. *Laudani*, *supra*, p. 548.

pressed. *United States* v. *Fuller, et al.*, 51 F. Supp. 953; *United States* v. *Lombard, et al.*, 54 F. Supp. 537. However, I do not believe that they have reached the proper result.

The motions to dismiss the indictment are allowed.

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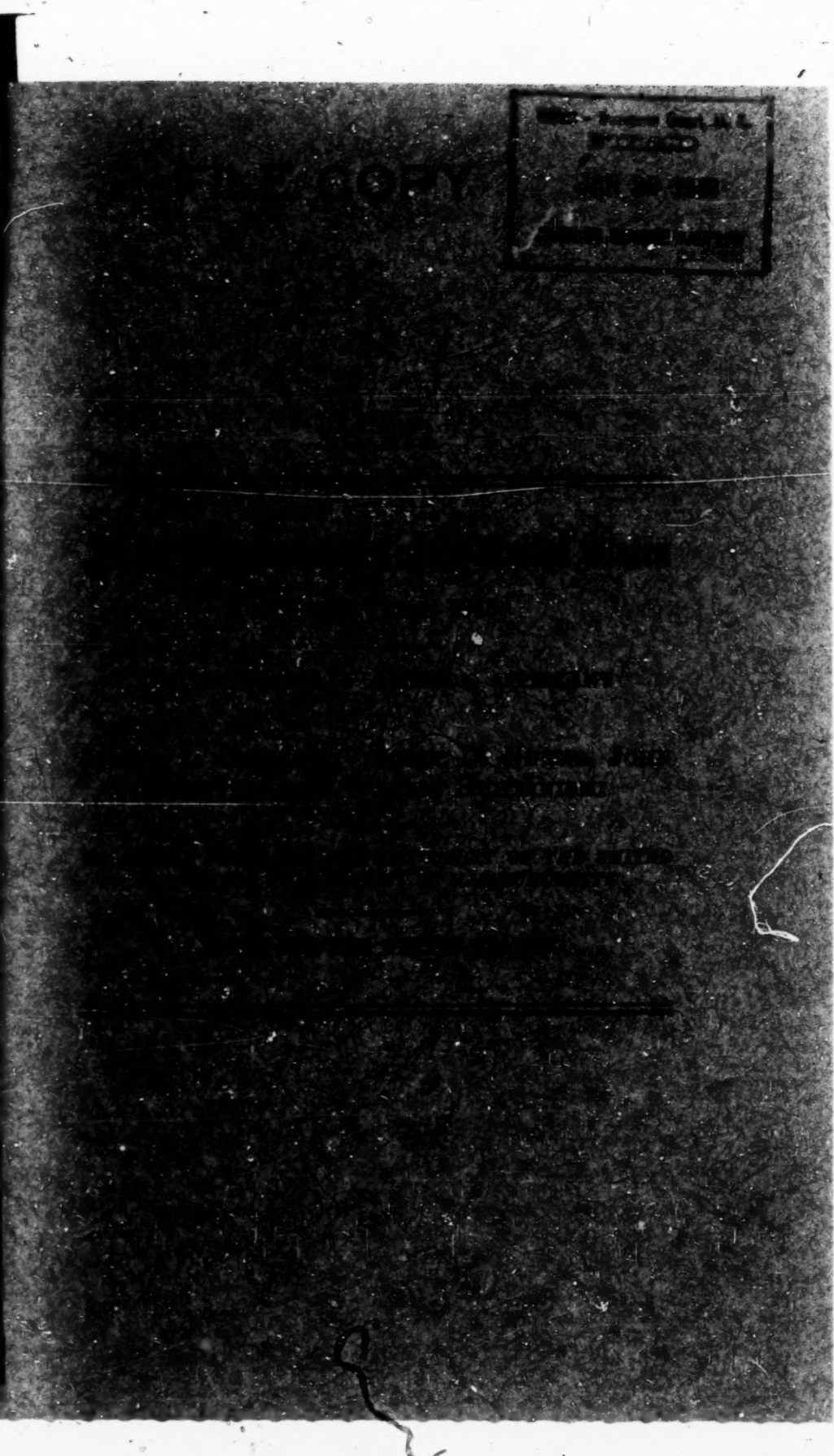

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680630—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 474

UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH L. CARBONE, VINCENT DI NUNNO, JOHN STROPPARO, AND WANTEE HUHTANIEMI

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 9–10) is reported at 61 F. Supp. 882.

JURISDICTION

The jurisdiction of this Court on direct appeal is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. IV, 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, 28 U. S. C. 345. The opinion of the district court dismissing the indictment was entered August 1, 1945 (R. 9–10).

A motion thereafter made that a formal judgment be entered was "denied, because not conforming to the practice in this District" (R. 14). The appeal to this Court was applied for and allowed on August 30, 1945 (R. 11–12). Probable jurisdiction was noted by this Court on November 5, 1945, and the case was transferred to the summary docket (R. 16).

QUESTION PRESENTED

Whether the prohibition of Section 1 of the Kickback Act applies to labor union officials who compel workmen on a federal project to surrender a portion of their wages to them as a prerequisite to their retention in employment, where the contractors on the project undertook to employ only such laborers as those officials approved and to discharge any employees at those officials' request, and where the exactions were made under color of union activity, but were collected solely for the officials' personal enrichment, and were neither paid nor reported to the union.

STATUTE INVOLVED

Section 1 of the Act of June 13, 1934 (c. 482, 48 Stat. 948, 40 U. S. C. 276b), commonly called the Kickback Act, provides:

> Whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work,

or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

STATEMENT

The defendants—Joseph L. Carbone, Wantee Huhtaniemi, John Stropparo, president, financial secretary, and treasurer, respectively, of Local 39 of the International Hod Carriers' Building and Common Laborers' Union of America, and Vincent DiNunno, president of the Eastern Massachusetts Laborers District Council and an employee of Local 39—who, by virtue of their positions and connections with the Local, made a contract (described below) with two contractors engaged jointly in the construction of various public buildings for the United States at Fort Devens, Massachusetts, were indicted (R. 1–4) on March 17, 1944, for conspiracy to violate the Kickback Act by inducing certain persons employed in the construction of such public buildings, financed in whole by grants from the United States, to give up part of the compensation to which they were entitled under their contracts of employment, by force, intimidation, threat of procuring dismissal

from such employment, and by other means. The details of the conspiracy, which is alleged to have continued from October 1, 1940, to March 30, 1941, are set forth in the indictment as follows:

On October 16, 1940, about one month after the signing of the contract for the construction at Fort Devens, Massachusetts, the defendants made an agreement with the contractors whereby the latter undertook to employ as laborers only such persons as were approved by the defendants and to discharge any such employees at their request. The contractors also agreed to employ forty persons named by the defendants, known as stewards, who were to perform such duties as the defendants should direct, and to provide an office for the defendants on the site of the construction. Approximately 7,500 laborers were employed by the contractors in the course of such construction. Following this agreement, the defendants approved to the contractors for employment as laborers only members of Local 39, which, in September 1940, had about 100 members, or of other locals of the International Union, and only such other persons as paid to the defendants the sum of $5.00. The defendants represented to such other persons that this payment would be regarded as an installment upon the initiation fee of Local 39 and the International Union and that each such employee would be required to pay the defendants $5.00 per week until the total initiation

fee was paid or he would not be permitted to continue to work.[1] The form of receipt given to the laborers for the initial and subsequent weekly payments was in the name of Local 39, by defendant Carbone as "Business Representative," and contained spaces for the date and total amount paid by the individual. The form recited: "This recept is good for one week from date." Each week the defendants directed the stewards to go among the laborers and demand of each non-member of the union either that he display a receipt showing that he had paid $5.00 for the current week or that he immediately pay such sum to the steward or the defendants under threat of procuring the laborer's dismissal from employment if he did not do so. The defendants were able to carry out this threat by reason of their agreement with the contractors, and they knew and intended that the laborers would pay the $5.00 weekly payments out of the compensation to which they were entitled by virtue of their employment.

The defendants kept no records of these payments to them by the laborers, except that if a laborer should present receipts showing payment of the initiation fee in full, his name was recorded and sent to the headquarters of the International Union with the sum of $5.35, representing the share of the fee to which the Inter-

[1] The initiation fee was originally $50.00, but it was later reduced to $40.00 and then to $25.00 (R. 2).

national was entitled under its rules. The defendants did not report to Local 39 or to any one the amounts received from laborers paying less than the full amount of the initiation fee, nor did they cause such sums to be recorded in the Financial Secretary's books as the rules of the International required. The defendants knew that the majority of the laborers who paid the initial sums of $5.00 would not and did not complete payment of the full initiation fee. In all these transactions whereby the defendants, acting in agreement, induced the laborers to give up part of the compensation to which they were entitled, they represented that they were acting for Local 39 and the International, at the same time concealing from those organizations the sums they thus collected from laborers who did not pay the initiation fee in full.

The defendants filed motions to dismiss the indictment on the ground, *inter alia,* that it does not state an offense cognizable in law (R. 5–9). In granting the motions (R. 9–10) the District Court held that the Kickback Act applies only to employers or those "vested by the employer with power to fix and terminate the employer-employee status"; that the power of the defendants to demand the discharge of any worker who refused to meet union requirements is "not a delegation of the employers' authority, but a power founded upon a contractual obligation created by a col-

lective bargaining agreement"; and that since the closed shop is within the legitimate objectives of trade unionism, "implementation of this objective by the means used by these defendants should not expose them to the risk of criminal prosecution."

ASSIGNMENT OF ERRORS

The District Court erred:

(1) In holding that the so-called Kickback Act, 48 Stat. 948, 40 U. S. C. 276b, applies only to employers or persons acting directly as their agents in exercising the power to employ and discharge employees;

(2) In holding that union officials are *ipso facto* immune from prosecution under the Kickback Act even though, under color of union activity, they induce a person engaged on a federal project to give up part of his compensation for the personal enrichment of such officials;

(3) In holding that the indictment does not state an offense cognizable in law;

(4) In dismissing the indictment.

SUMMARY OF ARGUMENT

The question here is whether the Kickback Act, which in *United States* v. *Laudani*, 320 U. S. 543, was held applicable to a foreman who had power to employ and discharge employees, ceases to be applicable where the defendants, union officials

not paid by the contractor, have the power to withhold employment and to discharge by reason of virtual delegation pursuant to a closed shop contract.

We contend that the Act applies, by any of the criteria held controlling in the *Laudani* case, because the defendants here had the power, in fact, to affect the employees' status. The language of the statute, which speaks of "threat of procuring dismissal" rather than of "threat of dismissal," supports this construction, and nothing in the Act or its legislative history even remotely suggests that its scope was to be limited to employers or to persons acting directly as their agents. Whatever may be the outer limits of the statute, neither its language nor its history justifies excluding from its coverage exactions obtained where, as here, there is a direct causal relationship between the employment and the exaction of part of the employees' compensation.

While the Kickback Act should not apply to legitimate union activities sanctioned by Congress, the facts alleged in the present indictment leave no room for any suggestion that the defendants were implementing the closed shop objectives of their union. The defendants here exacted funds for their own personal enrichment at the expense of both the union and the employees. The indictment is not based on a union check-off or on other legitimate closed shop activities. The defendants were preventing the fulfillment of union objectives.

ARGUMENT

This case presents the question whether the Kickback Act, in terms applicable to "whoever shall induce any person employed in the construction * * * of any public building * * * to give up any part of the compensation to which he is entitled under his contract of employment, by * * * threat of procuring dismissal from such employment", covers union officials who, under a closed shop contract whereby the contractors undertook to employ only such laborers as these officials approved and to discharge any employees at these officials' request, exacted fees from employees under threat of procuring their dismissal, where such fees were neither paid nor reported to the labor union. Otherwise stated, the problem is whether the Kickback Act, which in *United States* v. *Laudani*, 320 U. S. 543, was held applicable to a foreman who had power to employ and discharge employees, ceases to be applicable where the defendants, union officials not paid by the contractor, have the power to withhold employment and to discharge by reason of virtual delegation pursuant to a closed shop contract. If it is held that the statute is applicable to persons having such power, regardless of whether they are actually employed by the contractor, then there arises the subsidiary question whether they obtain immunity from prosecution by reason of being officers or employees of a labor union, when their exactions

do not inure to the benefit of the union, do not implement the objectives of the union, and result only in their personal enrichment at the expense of thousands of workmen on a federal project.[2]

The United States contends that the Kickback Act is applicable to any person having substantial power to withhold employment and to discharge employees, even though such person is not himself in the employ of the contractor, and that those acting in the name of labor unions are not immune from the operation of the Kickback Act where their exactions from employees are merely for personal enrichment and have no connection with legitimate union activities or objectives.

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[2] The indictment alleged (R. 1) that the workers were employed on the construction of Fort Devens and that the contractors were operating under a cost plus a fixed fee contract with the United States. That the act applies to all federally financed construction work was pointed out by the circuit court of appeals in the *Laudani* case (134 F. 2d 847, 850), as follows:

"Of course, no distinction is to be drawn, and we make none, between work for which the government directly lets a contract to which 'the prevailing rate' of wage to the contractor's employees attaches by virtue of the Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494, as amended, * * * and federally aided work performed for other public agencies to which rates of pay to employees attach by virtue of competent federal departmental regulations. The 'Kick-Back Act' is broad enough to embrace all work financed in whole or in part by federal funds. In fact, the bill (S. 3041) was purposely amended in such regard in Senate committee. See Senate Report, *supra*. [S. Rep. No. 803, 73rd Cong., 2d sess.]"

1. In the *Laudani* case, the Court held, without attempting "to delineate the outside scope of the Act's application," that the Kickback Act applies to a foreman who for his own benefit, compelled subordinate employees to surrender to him a portion of their wages as a condition to retaining their jobs. The Court's opinion examined the legislative history of the Kickback Act and the language of the statute and found (320 U. S. at p. 546) that "the purpose of the Act under consideration is to extend protection not merely to the legal form of employment contracts but to the substantive rights of workers actually to receive the benefit of the wage schedules which Congress has provided for them. The evil aimed at was the wrongful deprivation of full work payments." The legislative history of the act demonstrated to the Court that, as one part of the recovery legislation enacted by Congress during the depression years, "It was the purpose of the Kickback Act to assure that the federal funds thus provided for workers should actually be received by them for their own use except where diverted under authority of law or a worker's voluntary agreement." In rejecting the view of the circuit court of appeals that the act applied only to employers, the Court pointed out that "Foremen vested with full power to employ and discharge subordinates could frustrate the objectives of the Act just as effectively as could their employers, and foremen

not given such broad powers might nevertheless be able to use their authority to accomplish the same result." (320 U. S. at pp. 546–548.)

Tested by the factors which the court found controlling in the *Laudani* case, we believe that the defendants' acts are within the proscription of the Kickback Act.[3] While there are differences in the status of a foreman and of union officials, none of them, we think, detract from the considerations which the Court found convincing in the *Laudani* case and which are equally applicable to this case.

In so far as power to affect the employment relationship is concerned, the defendants' position was at least as powerful as that of Laudani. The indictment alleges that the contractors entered into an agreement with the defendants whereby "the contractors undertook to employ as laborers on the said construction only those who were approved by the defendants and to discharge any of those thus employed at the request of the defendants" (R. 2). It alleges, in substance, that the employers relinquished to the defendants a portion of their own authority to make controlling decisions in respect of employment. With this power, the defendants, of course, were not strangers to the employment relationship; their

[3] Indictments similar to the one involved in this case have been sustained in *United States* v. *Fuller*, 51 F. Supp. 951 (N. D. N. Y.), and *United States* v. *Lombard*, 54 F. Supp. 537 (W. D. N. Y.); see also *United States* v. *McGraw*, 47 F. Supp. 927 (N. D. N. Y.).

approval or disapproval meant the difference between having a job and losing it, between receiving pay derived from appropriated funds and not receiving such pay.

We perceive no basis for distinguishing this case from the *Laudani* case, as the district court did (R. 10), on the ground that the defendants' power over the workers stemmed from a contract with the employers rather than from a direct delegation of the employers' power to hire and fire, such as existed in the *Laudani* case. Whatever may have been the source of the defendants' power, the significant fact is that they were able to exact money from the workers because they were in a position to cause any worker who refused to make payments to them to lose his job. In the words of the indictment, the payments were compelled from a worker "under threat of procuring his dismissal from his employment if he did not pay the five dollars; which threat the defendants were able to carry out by reason of their aforesaid agreement with the contractors * * *" (R. 3). The defendants possessed as much power materially to affect the workers' contracts of employment as did the foreman in the *Laudani* case, and certainly they exacted the payments, in the language of the statute, "by * * * threat of procuring dismissal from such employment." Being union officials policing a closed shop contract, they had the power to make good their threats.

In the *Laudani* case, the Court looked at the realities of the situation, and held that the Kickback Act applied, not merely to employers, but to employees having the power to affect the employment of other employees. A similar realistic approach is called for here; nothing in the *Laudani* decision or in the statute itself suggests that the Act is further limited to persons acting directly as agents of employers. The purpose of the Kickback Act—"that the dollar which is intended for labor goes to that labor"[4]—is not to be thwarted by any such irrelevant legalisms as "privy to the contract of employment,"[5] or standing "in the shoes of the contractors" (R. 10). The critical question is whether the defendants had the power, in fact, to affect the employees' status. Here the indictment alleges that they did.

As we have said, nothing in the statute suggests that it is limited to employers or to persons directly acting as their agents. The statutory language punishing "whoever shall induce" a worker "to give up any part of the compensation to which he is entitled * * * by * * * threat of procuring dismissal" from employment, "or by any other manner whatsoever" indicates a broader sweep. It says, "threat of procuring dismissal," not "threat of dismissing." And nothing in the

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[4] Hearings, Subcommittee of Senate Committee on Commerce, S. Res. 74, 73d Cong., 2d sess., Vol. I, pp. 791–792.

[5] *United States* v. *Laudani*, 131 F. 2d 847, 850 (C. C. A. 3).

legislative history of the Act reflects any congressional purpose to exclude from the proscription of the Act extortion from workers on a federal project by men who accomplish their illegal objective by misusing their official connection with a labor union. That history is reviewed in the *Laudani* opinion, and there is thus no occasion to restate it here; see also, for a discussion of the history of the act, the Brief for the United States in the *Laudani case*, No. 71, October Term, 1943, pp. 38–43. Suffice it to say that the abuses which had been made known to Congress included not only those by employers but also those by other "racketeers," including union officials who placed self-interest above the interest of the union members. Hearings, Subcommittee of Senate Committee on Commerce, S. Res. 74, 73d Cong., 2d sess., Vol. I, pp. 35; 82, 808, 811, 814, 826.[8] As Judge Bryant stated in *United*

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[8] Judge Thomas C. T. Crain, District Attorney of New York County: "In many industries it has been from time to time confliction between union and nonunion labor. Some employers in employing nonunion labor have been approached by people having for their purpose the dismissal of those who are employed, and the employment of union men. In some cases there have been rival labor unions, one claiming to be the regular and authentic union and charging that the other is what might be called a 'bogus' organization" (p. 35).

* * * * * * *

George Z. Medalie, United States Attorney, S. D. N. Y.: "Racketeering is so wide-spread that it affects, particularly in large cities, most industries and practically all transportation. The two representatives of labor who talked here this

States v. *Fuller*, 51 F. Supp. 951, 953 (N. D. N. Y.), "A study of the history of the passage of the statute convinces me that, even though much of the testimony and discussions had to do with 'kickback' to employers, the legislators were determined to stop

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morning have shown that racketeering does extend to labor groups; each of them referred particularly to one racketeer in labor who was convicted in the Federal court, which was rather a left-handed way of dealing with that problem, because while that man was convicted of violation of the income tax law in form, in fact he was convicted of local extortion committed right in the State of New York" (p. 82).

* * * * * * *

Adolph Dzik, attorney for the anti-racketeering committee of the A. F. of L. building trade unions of New York:

Mr. Daru [counsel for the Committee]: "Do you think it is usually a dishonest contractor or an employee, superintendent or otherwise, who is sandwiching in between there and getting the 'kick-back'?"

Mr. Dzik: "I think it is the contractor and some of the officials of the unions." (p. 808).

* * * * * * *

Mr. Dzik: "* * * The first victim of the rackets is the workingman, and I believe also that the existence of the small clique that exists within the union organizations, in which the officials perpetuate each other in office and work in close harmony with the contractors for their own profit and gain, that is primarily responsible for the fleecing of labor on both sides" (p. 811).

* * * * * * *

Mr. Dzik: "I will say that primarily the contractors themselves are responsible, and that they corrupt the officials of the unions and in that manner are able to do it without being exposed. * * *" (p. 814).

* * * * * * *

Howard W. Ameli, United States Attorney, E. D. N. Y.: "Most of the difficulties which arise, as I have observed, oc-

the muleting of public project workers by anyone using the means stated in the statute."

To sustain the indictment in this case "is not to hold that the Act applies to every extortioner, blackmailer, or other person who extracts money from one who has previously received it for labor on a federally financed project." (320 U. S. at p. 548.) And, whatever may be the outer limits of the statute, neither its language nor its history justifies excluding from its coverage exactions obtained where, as in this case, there is a direct causal relationship between the employment and the exaction of compensation by illegal means.

2. As this Court has recognized, there are instances where the Congressional policy in favor of otherwise legitimate union activities must yield to a countervailing Congressional policy expressed in the Criminal Code. *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31. This is probably not such a case; we are prepared to agree with the court below (R. 10) that the Kickback Act should not apply to legitimate union activities which are sanctioned by Congress,[7] par-

curred under the guise of payments to alleged legitimate labor organizations. Since there is no element of interstate commerce involved, I do not feel that the Federal Government should attempt to regulate the local labor unions. This, in my opinion, is purely a matter for the State government; and if proper regulation could be had of labor unions, their organization and personnel, in my opinion, the cause of the offenses of this type would be removed" (p. 826).

[7] For example, this case does not involve the validity of a union check-off. However, a legitimate union check-

ticularly since the Kickback Act antedates the National Labor Relations Act by more than a year. But this is not a case of conflicting policies. Congress has never sanctioned the frauds which the defendants are charged with having committed on the workers and on the union in this case; there is no Congressional policy which is inconsistent with the application of the Act to the defendants' activities.

The district court thought (R. 10) that "The closed shop is within the legitimate objectives of trade unionism. Implementation of this objective

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off, the propriety of which is impliedly recognized in the provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, Secs. 8 (3), 9 (a), 49 Stat. 449, 452, 453; 29 U. S. C. 158, (3), 159 (a)) for the designation of exclusive collective bargaining representatives and authorizing closed-shop agreements with such representatives, would not, in our opinion, fall within the "Kick-back" Act, since it would constitute merely the collection by an otherwise lawful method of an assessment that the employee can validly be required to pay in any event as a condition of securing or retaining his employment; and the Secretary of Labor has so recognized by providing a procedure for securing authorization of a deduction that "is for the benefit of the employees or their labor organization through which they are represented and is provided for in a bona fide collective bargaining agreement." Section 2.5 (b) (2) (ii) of Regulations of Secretary of Labor (29 C. F. R.) as amended February 3, 1942 (7 Fed. Reg. 686, 688). In *Virginia Electric & Power Company* v. *National Labor Relations Board*, 319 U. S. 533, this Court impliedly recognized that a union not company-dominated may provide employees with a sufficient *quid pro quo* for the check-off.

by the means used by these defendants should not expose them to the risk of criminal prosecution." But on the facts alleged in the indictment, there is no room in this case, in our view, for any suggestion that the defendants were implementing the closed shop objective of their union. The defendants were acting contrary to the interests of the union. Defendants here exacted funds, not for the benefit of the union, not for the ultimate benefit of the employees which might be expected to result from union membership, but for their own personal enrichment at the expenses of union and employees alike. Defendants can therefore not claim that they are within the exempting policy of the National Labor Relations Act. The indictment makes clear that the prosecution is not based on legitimate closed shop activities. It specifically alleges (R. 3):

> And the defendants made no report to the Local 39, or to anyone, of the amount they had received from laborers paying less than the full initiation fee as aforesaid, or the total sums they had collected in this way, nor did they cause any of the sums collected in this way and received by them to be recorded in the Financial Secretary's book as the rules of the said International Union required: The defendants well knowing that the majority of those who paid the initial five dollars would not and did not complete payment of the full initiation fee.

The scheme charged in the indictment contemplated that with the sanction of a closed shop agreement all of the workers on the project would be required to become members of the union of which the defendants were officers and to pay a substantial initiation fee collectible in weekly installments. The nub of the scheme was that many of the workers who paid installments to the defendants "would not and did not complete payment of the full initiation fee." Accordingly, to enable themselves to exact the payments for their personal enrichment the defendants made no union records of the payments they secured from the workers, as the rules of the International Union required, and they concealed from the local union and the International Union the sums they collected from all those persons who did not pay the full initiation fee (R. 3).

It is evident, therefore, that the union received no benefit from the diversion by the defendants of funds which were paid to the defendants on the assumption that the payments went to the union. Far from implementing the objectives of the union, the defendants were obviously precluding the fulfillment of those objectives by their misuse of their official positions. The workers who made the payments were, of course, not benefited. The union was not benefited. The sole advantage gained from the transactions described in the indictment accrued to the defendants personally.

Such conduct, obviously, does not amount to an implementation of the objectives of trade unionism.

This case is of the same pattern as *Nick* v. *United States*, 122 F. 2d 660, 669–670 (C. C. A. 8), certiorari denied, 314 U. S. 687, rehearing denied, 314 U. S. 715,[8] which involved a prosecution under the Anti-Racketeering Act, 18 U. S. C. 420a–420e. As in this case, the defendants were officers of a local union, and they were convicted for using their union offices to exact bribes from employers with whom they negotiated wage contracts for the union. The circuit court of appeals rejected the same reasoning which the district court followed in this case and pointed out that extortion is as much an offense when committed by union officers, for their personal gain, in connection with wage negotiations as it is when committed by persons not affiliated with labor organizations. The reasoning of the court aptly expresses the considerations in support of the Government's position in this case (122 F. 2d at 668):

> Individuals may obtain power in labor organizations which is capable of use to obtain unwilling payments from employers through bringing about or threatening to bring about violence or through coercion.

[8] The petition for a writ of certiorari was denied after the Court had granted the writ in *United States* v. *Local 807*, 315 U. S. 521, and a second petition for rehearing was denied after the decision of the *Local 807* case (316 U. S. 710).

> So long as that power is used solely to obtain more wages, such exercise of power is expressly excluded from the Act. It is only when such power is misused to obtain personal benefits for such individuals and not for the membership that the Act applies. The Act covers no action by a labor leader honestly acting for the members of his organization. It does cover the compulsory payment of graft to a labor leader for his own individual enrichment. Thus construed, the Act is clearly as protective to labor organizations and their membership as it is to employers. The payment of graft to a labor leader is clearly, the purchase of his loyalty to his organization. The result is betrayal of his organization. Labor is likely to suffer more through such a sellout than the employer who, willingly or unwillingly, pays the bribe. By punishing the traitorous leader who uses his power for his personal enrichment at the expense of his organization, the Act truly is at least as protective of employees as it is of employers. The Act makes such betrayal hazardous.

Cf. *United States* v. *Local* 807, 315 U. S. 521.

The exactions which the defendants obtained from thousands of workers on this federal project were not, in the words of this Court in the *Laudani* case (320 U. S. at 547), "diverted under authority of law or a worker's voluntary agreement." Instead, they were obtained by threat of

procuring dismissal of the workers from their employment. And they were obtained solely for the benefit of the defendants individually and not for the benefit of the union or of the workers who made the payments. The purpose of the Kickback Act is not served by denying to workers the protection of the Act solely because the exactions upon them were made by union officers rather than by a foreman or a contractor.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed.

J. HOWARD MCGRATH,
Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
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Attorneys.

JANUARY 1946.

FILE COPY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 474

THE UNITED STATES OF AMERICA,
Appellant,

vs.

JOSEPH L. CARBONE, VINCENT DeNUNNO, JOHN STROPPARO AND WANTEE HUHTANIEMI

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

WILLIAM M. QUADE,
Counsel for Appellees, John L. Carbone, John Stropparo and Wantee Huhtaniemi;
MICHAEL CARCHIA,
WALTER F. LEWIS,
Counsel for Appellee, Vincent DeNunno.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 474

THE UNITED STATES OF AMERICA,
Appellant,

vs.

JOSEPH L. CARBONE, VINCENT DiNUNNO, JOHN STROPPARO AND WANTEE HUHTANIEMI

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

Now come the Defendants and submit the following statement, opposing the grounds and matters asserted by the Appellant, and against the jurisdiction of the Supreme Court of the United States.

The United States of America, in its prayer for appeal, claims jurisdiction by the Supreme Court to review the judgment entered in this cause by virtue of the Criminal Appeals Act, 18 U. S. C., Supp. IV, 682 and in its "Statement as to Jurisdiction", affirmatively asserts that the District Court allowed the Defendants' Motions to Dismiss based on the construction of the statute (see appellant's Statement as to Jurisdiction paragaph 2, page 6).

It is obvious from the opinion of J. Sweeney, that he followed the opinion of the Supreme Court rendered in the

case of *United States* v. *Laudani*, 320 U. S. 543, wherein guides were established in the interpretation of Sec. 1, 48 Stat. 948; 40 U. S. C. A. Sec. 276b. The District Court therefore did not construe the statute upon which the indictment was founded. Where it appears from the opinion of the District Court that its judgment was not based upon the invalidity or construction of the statute on which the indictment is founded, Supreme Court has no jurisdiction of direct appeal.

U. S. v. *Wayne Pump Co.*, 317 U. S. 200.

The District Court, by its opinion, dismissed the indictment, as a matter of law, because it did not contain sufficient allegations within the meaning of statute upon which it was predicated. The indictment appears to be drawn for the purpose of fitting in these defendants within the pockets of a cloak of a legal offense against the United States. The indictment, contains deficiencies as to pleading because nowhere does it follow the opinion of the Supreme Court rendered in the *Laudani* case, 320 U. S. 543, because the essential element "vested by the employer with power to fix and terminate the employer-employee status", is lacking.

The case of *United States* v. *Borden Co.*, 308 U. S. 188, has stated the principle that the Government may not appeal, under section 682 of U. S. C., Supp. IV, from a judgment which rests on mere deficiencies of an indictment as a pleading, as distinguished from the construction of the statute which underlies the indictment, nor will an appeal lie where the District Court considered the construction of the statute but also rested its decision on the independent ground of a defect in pleading which is not subject to examination by the Supreme Court.

"Construction of an indictment and its sufficiency merely as pleading are questions for District Court,

whose decision thereon must be accepted by Supreme Court on Government's appeal from decision based on invalidity or construction of statute underlying indictment." U. S. *v.* Hastings, 296 U. S. 188.

It was held that where construction and validity of statute constituting basis of indictment having been previously adjudicated, right to proceed directly by error from District Court to United States Supreme Court was denied.

U. S. v. *Denison* (1931), 47 F. (2d) 433, 69 App. D. C. 71.

Motion to Dismiss Appeal

The defendants move that the appeal be dismissed on the following grounds:

The Government does not present a question which is substantial. The opinion of the District Court states that these defendants were indicted previously and demurrers and motions to quash were sustained and allowed.

U. S. v. *Carbone et al.*, 56 F. Supp. 343.

That first indictment contained allegations of the substantive offense as well as allegations of conspiracy against these same defendants.

The judge of the District Court at that time suggested to counsel representing the Government that since the *Laudani* case was pending in the Supreme Court of the United States, that he join the case of these defendants in order to have the statute involved construed by the Supreme Court. Counsel for the United States, however, filed a motion to re-argue the case of these defendants, before the same District Court, setting forth in its motion the fact that a writ of certiorari was pending in the case of Laudani. This motion was not heard until after the Laudani decision was rendered by the Supreme Court of the

United States, and, in the meantime, the United States brought this indictment, alleging only a conspiracy, adding the words "that the employer would hire only those whom the defendants approved and discharge those employees whom they would suggest" and adding that they were union officials. These additions to the present indictment was an attempt to spread out a legal offense before the Supreme Court handed down its opinion in the *Laudani* case. When the opinion in the *Laudani* case was handed down by the Supreme Court, the Motions of the Defendants to Dismiss this Indictment, and the Motion of the Government for a Rehearing, were both brought forward for a hearing before the District Court. Counsel for the United States moved that the Motion for a Rehearing filed on the first indictment, after the court had sustained the demurrers and had quashed the indictment, be dismissed. The docket record indicates, as pointed out in the District Court opinion, that the demurrers were sustained and the indictment was quashed.

Following this Motion, made by counsel of the United States, and after it was allowed, Defendant's counsel argued Motions to Dismiss this indictment. Counsel for the United States opposed these motions orally and filed a Memoranda of Law.

During the oral argument by counsel for the United States, the Court stated that it was clear from the opinion rendered in the *Laudani* case that the power to fix and determine the contract of employment was an essential element in order to charge these defendants with a crime and, further, that it appeared from the allegations in the indictment that a closed-shop agreement had been entered into between the employer and these union officials for them to approve the hiring of employees and that they would discharge only those whom they would suggest.

Counsel for the United States replied, conceding that it would so appear from the opinion, that his superiors felt that this indictment was in proper shape for the Supreme Court to render a full construction of the statute. Apparently, the District Court affirmed its orally expressed thoughts in its written opinion.

Had counsel for the United States accepted the suggestion of the Judge when the first indictment was quashed "to join with the Laudani case", there would be no need of this appeal. He chose to wait until the decision was rendered by the Supreme Court in the *Laudani* case, but since the acts complained of were about to be outlawed by the statute of limitations, this indictment was procured within a few days of the expiration date of the last overt act by anticipating the possible required allegations, affecting the meaning of the words "whoever" and the words "contract of employment", so that we have, in the present indictment, the allegation of "hiring only those whom the defendants would approve", and discharging those whom they would suggest, and that the defendants were union officials. This indictment was returned a few weeks before the decision of the Supreme Court in the *Laudani* case.

The opinion of the District Court, it is charged in this appeal, grants immunity to union officials from the Kick-Back Act, but it is elementary that if the allegations as charged in this indictment could be established as a fact, local authorities could well prosecute these defendants or any union official wherever and whoever he may be for larceny from the employees or embezzlement from the union, or both.

It is, therefore, not a substantial question, requiring the attention and further interpretation of the statute involved by the Supreme Court of the United States. It is submitted that the real test is whether or not the District

Court having accepted the construction of the statute, by the Supreme Court in the *Laudani* case, refutes the contention by the Government that its appeal raises a substantial question.

The defendants, by and through their counsel, respectfully submit that their Motion to Dismiss the Appeal be allowed.

(Signed) WILLIAM M. QUADE,
Counsel for John L. Carbone,
John Stropparo, Wantee Huhtaniemi;
MICHAEL CARCHIA,
WALTER F. LEVIS,
Counsel for Vincent DiNanno.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 454

THE UNITED STATES OF AMERICA, *Appellant*,

v.

JOSEPH L. CARBONE, VINCENT DINUNNO, JOHN STROPPARO AND WALTER HUHTANIEMI.

Appeal from the District Court of the United States for the District of Massachusetts.

BRIEF FOR APPELLEES.

WILLIAM M. QUADE,
HAMMOND E. CHAFFETZ,
Counsel for Appellees, John L. Carbone, John Stropparo and Walter Huhtaniemi.

MICHAEL CARUSO,
WALTER F. LEWIS,
Counsel for Appellee, Vincent DiNunno.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 474.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

JOSEPH L. CARBONE, VINCENT DINUNNO, JOHN STROPPARO, AND WANTEE HUHTANIEMI.

Appeal from the District Court of the United States for the District of Massachusetts.

BRIEF FOR APPELLEES.

Opinion Below.

The opinion of The District Court (R. 9-10) is reported in 61 F. Supp. 882.

Jurisdiction.

Motions to dismiss the indictment were allowed on August 1, 1945 (R. 14). The order allowing this appeal was entered August 30, 1945 (R. 11). The jurisdiction of this Court is

invoked under The Criminal Appeals Act, Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. IV, Sec. 682, and under Section 238 of the Judicial Code, 28 U. S. C., Sec. 345.

Question Presented.

Whether sums paid to union officials as union initiation fees by employees on a public construction project become "kickbacks" under the Kickback Act when it is alleged that the union officials failed to account to the union for a large part of the sums thus collected by them.

Statute Involved.

Section 1 of the Act of June 13, 1934 (c. 482, 48 Stat. 948, 40 U. S. C., Sec. 276b), commonly called the Kickback Act, provides:

> Whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Statement.

Appellees are charged with having conspired to violate Section 1 of the Kickback Act. They are the President, Treasurer, and Financial Secretary of Local 39 of the International Hodcarriers Building and Common Laborers Union of America, and the President of the Eastern Massachusetts Laborers' District Council, who is also an employee of Local 39.

The crucial facts, taken from the indictment, which are set forth in the District Court's opinion (R. 9-10) are these:

The case arose in connection with a contract for the construction of various public buildings in Ft. Devens, Massachusetts in 1940. The contract was on a cost plus fixed fee basis, the contractor undertaking to furnish the materials, equipment and labor. Appellees "by virtue of their positions in Local 39" made an agreement with the contractors under which the latter undertook to employ as laborers on the project only those who were approved by appellees, and to discharge any of those thus employed at appellees' request. Appellees approved to the contractors only members of the union or such persons as paid to appellees the sum of $5.00. The continued approval of appellees of laborers not previously members of the union was conditioned upon the payment of $5.00 per week "until the full amount of the initiation fee into Local 39 and the International Union" had been paid.* Appellees threatened to procure the discharge of any workers who failed to make the required payments, and they knew and intended that the workers would make the payments out of compensation earned.

The indictment alleges in addition that each laborer upon payment of the $5.00 sum mentioned was given a receipt signed by appellee Carbone as Business Representative of the union (R. 2). Appellees are alleged to have kept no records of the persons who had made such payments but when a laborer presented receipts showing that he had paid the full amount of the initiation fee his name was recorded—presumably in the Financial Secretary's book—thus enrolling him as a union member. His name was also sent, together with the sum of $5.35 "which was that part of the initiation fee to which the International Union according to its rules was entitled," to the headquarters of the International Hodcarriers Building and Common Laborers Union in Washington, D. C.

* This amount was alleged in the indictment to have been at first $50.00 but to have been gradually reduced to $25.00.

Appellee apparently made no report to the union of amounts received from laborers paying less than the full initiation fee, or the total sums which they collected, although the rules of the International Union required that sums collected in this way be recorded in the Financial Secretary's book. Appellees are thus accused of concealing from Local 39 and the International Union the sums they collected from persons who did not pay the full initiation fee. They are also charged with knowledge that the majority of those who paid the initial $5.00 would not complete payment of the "full initiation fee."

The District Court regarded the assessments upon the laborers who were not previously members of the union as a normal union practice, stating (R. 10):

> The closed shop is within the legitimate objectives of trade unionism. Implementation of this objective by the means used by these defendants should not expose them to the risk of criminal prosecution.

Summary of Argument.

I.

The court below regarded the sums collected as *bona fide* assessments of union initiation fees in implementation of legitimate union objectives, and its construction of the indictment is binding on this appeal. *United States* v. *Borden Company*, 308 U. S. 188. If support for the lower court's interpretation is required, it can be found in the fact, admitted in the indictment, that when a laborer completed payment of the full amount of the initiation fee he became enrolled as a member of both the local and the International Union. The initiation fee is a normal and usual assessment by a union on a person seeking employment on a union job or membership in the union. The wrong complained of in the indictment lay not in the assessment of the initiation fee, but in the alleged failure of appellees to account to the union. The Kickback Act does not apply.

II.

The Kickback Act, when read in the light of its legislative history, is shown to be clearly inapplicable to payments to unions or union officials. The Congressional Committees concerned with the bill which became the Kickback Act, and the sponsors of the bill, were careful to point out that it was intended to apply only to contractors, sub-contractors and their officials.

ARGUMENT.

I.

The initiation fee is a normal and usual assessment upon the admission to membership in a union, and, therefore, falls outside the scope of the Kickback Act.

A fair reading of the indictment as construed by the Trial Court discloses the absence of the element of wrongful exaction of money from the laborer which is a *sina qua non* of the applicability of the Kickback Act. The government is mistaken in its view that the indictment charges appellees with extorting kickbacks "under color of union activities." The assessment of a union initiation fee neither constitutes colorable union activity nor involves any extortion.

That the assessments were, in truth, initiation fees is shown by the fact that payment of the full amount of the fee resulted in the laborer being enrolled as a member of both the local and international unions. According to the indictment, when the laborer paid the initiation fee in full, appellees recorded his name and sent it to the headquarters of the International Union "with the sum of five dollars and thirty-five cents, which was that part of the initiation fee to which the International Union according to its rules was entitled" (R. 3). The indictment does not purport to challenge the payments of those laborers who paid the full initiation fee and became enrolled as union members. The charges of the indictment appear to be directed at those instances only in which the laborers discontinued working on the job before they had paid the last installment of the ini-

tiation fee. Thus, under the indictment, only the initial installments are held to be kickbacks, and they lose their taint if and when the last installment is paid and the laborer is taken into the union. In other words, the laborer himself appears to have the option by discontinuing his employment to turn the initial installments of the initiation fee into a kickback, or, by continuing to work and completing the payments, to undo the wrong that is supposedly being committed against him.

The indictment contains no intimation that any of the laborers was prevented by appellees from remaining on the job until the initiation fee was fully paid. Although appellees had the power to cause the discharge of any laborer, and conceivably could have brought about his discharge prior to payment of the initiation fee in full, it is nowhere suggested that this was done or attempted. So far as appears, whenever the laborer terminated his employment prior to payment of the last installment of the initiation fee he did so of his own volition.

Nor is there any allegation that the initiation fee was excessive, or that its assessment was arbitrary or unauthorized by the union rules, or, in and of itself, improper in any respect. It is common knowledge that the assessment of initiation fees as high as $25.00 and $50.00, and frequently higher, is a normal and usual incident, especially in the construction industry, of the employment of persons not previously members of the union.* From the standpoint of the

* *American Labor Unions*; Peterson, (Harper, 1945), p. 123. It appears that initiation fees, unlike dues, are not levied primarily for the purpose of revenue. They are used to control membership and in fairness to old members who have contributed many years to the support of unions and have enabled the unions to obtain higher wages and better work conditions than would have existed otherwise. The amounts of initiation fees are usually fixed by the local unions but are regulated in different ways and different degrees by the international unions. The international union decides what proportion of the initiation fee collected shall go into the general treasury. Seldom is the sum forwarded to the international larger than $5.00 or $10.00, although local initiation fees may be $25.00, $50.00 or more. Ib. pp. 123-126; *Union Rights and Union Duties*, Seidman (Harcourt Brace, 1943), pp. 40-41, 103.

laborers in this case they were subjected to assessments which, not being union members, they were bound to pay in any event in order to obtain employment on a union job. So far as they were concerned, although the installment payments were required of them as a condition to their obtaining employment and keeping their jobs, the payments were not extorted from them any more than are initiation fees generally—or for that matter, union dues—which are universally accepted as legitimate charges made by trade unions on members and applicants for membership. It can hardly be said that the initiation fees were collected from the laborers "without legal cause or excuse." *United States v. Laudani*, 320 U. S. 543, 545.

While the government disclaims any purpose to interfere with proper union activity, it fails to point out wherein the indictment alleges that the assessment of the initiation fees in this case was unauthorized or otherwise improper. The case is entirely different from *Nick* v. *United States*, 122 F. 2(d) 660, which sustained a conviction under the Anti-Racketeering Act where union officials extracted money from certain employers under threat of demanding exorbitant wages for union members. There, no legal basis existed for the payments demanded and received from the employers. Here the assessments against the laborers appear to be in all respects in conformity with the union rules and standard union practice. The wrongdoing complained of relates to the administration of the internal affairs of the union and the failure of appellees to account fully to the union for sums legitimately obtained by them from the laborers.

Significantly, and, it is submitted, correctly, the trial court's opinion makes no reference to the alleged failure of appellees to render an accounting to the union of sums collected by them (R. 9-10). This fact would be pertinent only if, as the government erroneously asserts, the indictment charged appellees with perpetrating extortion in the guise of conducting union activity. The court, however, as indi-

cated, considered the assessment of the initiation fees to be *bona fide* and recognized the practice as an appropriate implementation of legitimate union objectives (R. 10). Had the court regarded the initiation fee assessments as sums extorted by appellees under color of union activity, the court's characterization of the practice, just referred to, would have been pointless. The trial court's interpretation of the indictment is, of course, binding on this appeal. *United States* v. *Borden Company*, 308 U. S. 188.

The Kickback Act is designed for the protection of the laborer. *United States* v. *Laudani, supra.* The failure of appellees as alleged in the indictment to report to the local union the sums collected from those who failed to complete payment of the full initiation fee caused no injury to the laborers. The wrong complained of lay not in assessing the initiation fee, but in failing to account to the union in violation of the union's rules. The union is the party aggrieved, but the nature of its grievance is far removed from the application of the Kickback Act.

The cases of *United States* v. *Fuller*, 51 F. Supp. 953, and *United States* v. *Lombard*, 54 F. Supp. 537, noted in the trial court's opinion (R. 10) involve union assessments against non-union laborers on a weekly or hourly basis for the duration of the employment and without conferring union membership. Whether a union is entitled to assess a fee simply for the privilege of working on a union project is not necessarily in the same category as collection of union dues and union initiation fees which carry with them membership in the union. The cases referred to are therefore distinguishable from the present case.

II.

The legislative history of the statute negatives its application to Unions or Union Officials.

In *United States* v. *Laudani, supra*, this Court recognized that the broad sweep of the language used in the Kickback Act called for an examination of the legislative history to

determine the scope of the Congressional intent. Without attempting to delineate the outside scope of the Act's application the court held that an employing company's foreman who possessed the power to employ and discharge fell within the Act's prohibition.

The Government in this case points to the authority of the union under its agreement with the contractor to determine who would be employed and to require the discharge of persons previously employed. Appellees, the Government asserts, possessed the power to employ and discharge and, therefore, are in the same status as the foreman in the *Laudani* case. The trial court rejected this superficial analogy, pointing out that the power of appellees with respect to hiring and firing was not in fact comparable to that of the foreman in the *Laudani* case. The Court said (R. 10):

> It is true that they could demand the exclusion of any worker who refused to meet the union requirements. However, this constitutes, not a delegation of the employers' authority, but a power founded upon a contractual obligation created by a collective bargaining agreement. These defendants do not stand in the shoes of the contractors; they represent an adverse interest.

The trial court was of the view that neither the history nor the purpose of the kickback legislation warranted extension of its scope to include appellees, and pointed out that the language of the Senate report quoted in this Court's opinion in the *Laudani* case (p. 548) to support the inclusion of foremen served equally to support the exclusion of union officials.

Examination of the legislative history discloses that, as the popular name of the Act implies, the Congress meant to deal only with sums kicked *back* or given *back* by the employee to the employer or sub-employer or other person having a similar relationship to the employee. The practice of paying to a union out of compensation received for work on public projects sums in the form of union dues, initiation

fees, or assessments in other forms, is too well known to have escaped the attention of the Congress. Nevertheless, the Committee reports and the debates studiously avoided any reference to the possibility that unions or union officials might fall within the prohibitions of the Act.

In the report of the Judiciary Committee of the House reporting the Bill S. 3041 which became the Kickback Act, it is stated (H. Rep. No. 1750, 73d Cong. 2d Sess.):

> This bill is aimed at the suppression of the so-called "kickback racket" by which a contractor on a Government project pays his laborers wages at the rate the Government requires him to pay them, but thereafter forces them to give back to him a part of the wages they have received.

The Chairman of the House Committee referred to the bill on the floor in the following terms (Cong. Rec. 73d Cong. 2d Sess., p. 10521):

> May I suggest to gentlemen on both sides of the House that we are going to attempt to call up on the first opportunity S. 3041, which is known as the 'kick-back' bill, preventing contractors from compelling workmen to return a part of their salaries.

The following is the language of the Senate Committee report quoted in the *Laudani* case to which the trial court, as previously mentioned, referred (S. Rep. N. 803, 73d Cong. 2d Sess.):

> Hearings of the Senate Committee on Racketeering revealed that large sums of money have been extracted from the pockets of American labor, to enrich contractors, sub-contractors, *and their officials.* (Emphasis supplied)

When the Bill S. 3041 was before the Senate, having been favorably reported by the Senate Committee, Senator Copeland, in charge of the bill, explained its purposes as follows (Cong. Rec. 73d Cong., 1st Sess., p. 7401):

> . . . I should be unwilling to have the bill passed without the Senate understanding its purpose. Much has been said on the floor recently about what is known as the "kick-back" where employers or sub-employers have indecently and immorally taken from employees a part of the wage which it was supposed they were being paid. The testimony before our committee investigating crime is so startling as to indicate that as much as 25 per cent of the money supposed to be paid out of Federal funds for employment is actually repaid to employers in this improper manner. The purpose of the bill is to attempt to put some check upon that practice.

Indicating that the bill had the support of the American Federation of Labor, Senator Copeland quoted from a letter from the President of the Federation, Mr. William Green, as follows:

> It has been a common practice for contractors constructing Federal buildings to pay the employees the prevailing rate as determined by the Secretary of Labor, and then have them return a certain amount to the contractor. This is a most vicious practice.

The legislative history thus carefully restricts the Act to persons in the status of an employer or those acting for the employer.

Isolated references to unions in the Congressional hearings on the general subject of racketeering, which are quoted in the Government's brief (pp. 15-17) can hardly be deemed to refute the persuasive effect of the foregoing statements by the sponsors of the bill. The Congressional Committee and the sponsors of the Act would indeed have been considerably less than frank with the Congress if it was intended that the law would apply to labor unions and their officials. Where the legislative intent is clear, the court is not justified in ignoring it. See L. Hand. J., concurring, *Guiseppi* v. *Walling*, 144 F. 2(d) 608, 624.

Furthermore, the wording of the statute, though somewhat vague, tends to support the result here contended for. The Act was designed, according to its title, to make it un-

lawful "to prevent anyone from *receiving* the compensation contracted for" under the laws covering rates of pay on public projects. And the language "to give up any part of the *compensation* to which he is entitled under his contract of employment" would seem to relate to transactions of the employee with his employer. It is submitted that the reasoning of the Circuit Court of Appeals in the *Laudani* case, 134 F. (2) 847, 849-850, which is discussed at length in the opinion of this Court (pp. 545-546) is sound, save only for the failure of that court to recognize that the foreman exercised the functions of the employer and fell within the required employer-employee relationship. This appears to have been recognized by this Court when it stated (p. 545) that the view of the Circuit Court "might have been pertinent had the indictments here been against a common blackmailer, extortioner, or some other person not alleged to have been vested *by the employer* with power to fix and terminate the employer-employee status." (Emphasis supplied) The fact that the statute is a highly penal one calls for a strict interpretation. *United States* v. *Resnick*, 299 U. S. 207, 209.

CONCLUSION.

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 474.—October Term, 1945.

The United States of America, Appellant, *vs.* Joseph L. Carbone, Vincent Di Nunno, John Stropparo and Wantee Huhtaniemi.	On Appeal from the District Court of the United States for the District of Massachusetts.

[March 25, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

This case comes to us under the Criminal Appeals Act[1] directly from the United States District Court for the District of Massachusetts. It raises an important question as to the meaning and scope of § 1 of the Act of June 13, 1934,[2] commonly known as the Kickback Act, making it unlawful to prevent anyone employed in construction or repair work of a public nature or financed in whole or in part by the United States from receiving the full compensation to which he is entitled.

Three of the appellees are officers of Local 39 of the International Hod Carriers' Building and Common Laborers' Union of America; the fourth appellee is president of the Eastern Massachusetts Laborers District Council and is also employed by Local 39. They were indicted for conspiring to violate § 1 of the Kickback Act. It was charged that during the period of the alleged conspiracy, October 1, 1940, to March 30, 1941, two contractors were engaged in the construction of various public buildings for the United States at Fort Devens, Massachusetts. The appellees,

[1] Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271; 18 U. S. C. § 682.

[2] Section 1 of the Act provides: "Whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both." 48 Stat. 948; 40 U. S. C. § 276b.

by virtue of their positions with Local 39, made an agreement with the contractors whereby the latter undertook to employ as laborers only such persons as were approved by appellees and to discharge any such employees at appellees' request. The contractors also agreed to employ forty persons named by the appellees, known as stewards, to perform such duties as the appellees might direct, and to provide an office for the appellees on the site of the construction. About 7,500 laborers were employed during the course of the construction.

Pursuant to this agreement, the appellees approved to the contractors for employment as laborers members of Local 39 or of other locals of the International Union and only such other persons as paid the appellees the sum of $5.00. The appellees represented to the latter persons that this payment would be regarded as an installment upon the initiation fee of Local 39 and the International Union and that each such employee would be required to pay the appellees $5.00 per week until the total initiation fee was paid "or the person would not be permitted to continue work upon the said construction." Receipts were given for each weekly payment. The initiation fee was originally $50.00, but it was later reduced to $40.00 and then to $20.00.

It was further charged that the appellees directed the stewards each week to go among the laborers and demand of each nonmember of the union either that he display a receipt showing that he had paid the $5.00 for the current week or that he immediately pay that sum to the stewards or to the appellees "under threat of procuring his dismissal from his employment" if he did not do so. The appellees allegedly were able to carry out this threat by reason of their agreement with the contractors, the appellees "well knowing, and intending, that the laborers would pay the said five dollars out of the compensation to which they were entitled under their contracts of employment with the said contractors."

The indictment also stated that the appellees kept no records of those who made payments to them. But if a laborer should present receipts showing payment of the initiation fee in full, his name was recorded and sent to the headquarters of the International Union with the sum of $5.35, representing the share of the fee to which the International was entitled under its rules. And the appellees "made no report to the Local 39, or to anyone, of

the amount they had received from laborers paying less than the full initiation fee as aforesaid, or the total sums they had collected in this way, nor did they cause any of the sums collected in this way and received by them to be recorded in the Financial Secretary's book as the rules of the said International Union require: The defendants [appellees] well knowing that the majority of those who paid the initial five dollars would not and did not complete payment of the full initiation fee."

The indictment concluded by charging that the appellees acted in concert in these matters, that they induced the laborers to give up part of the compensation to which they were entitled under their contracts, that they represented that they were acting for Local 39 and the International, and that they concealed from these organizations the sums they thus collected from laborers who did not pay the initiation fee in full.

The appellees moved to dismiss the indictment, alleging as one ground that it did not state an offense cognizable in law. Relying upon this Court's decision in *United States* v. *Laudani*, 320 U. S. 543, the District Court granted the motions. 61 F. Supp. 882. It plainly was of the view that the facts as alleged in the indictment fell outside the scope of the Kickback Act. It stated that it did not believe that "either the history or the purpose of the Kickback legislation warrants an extension of its scope to include these defendants. . . . The closed shop is within the legitimate objectives of trade unionism. Implementation of this objective by the means used by these defendants should not expose them to the risk of criminal prosecution." From this judgment the United States appeals.

We agree with the District Court. Section 1 of the Kickback Act punishes "whoever" induces another person employed on a federally financed project "to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever." The United States contends that this provision applies to the instant situation inasmuch as the appellees induced certain workers on a federal project to give up part of the compensation to which they were entitled by threatening to procure dismissal from their employment. Emphasis is placed upon the allegation in the indictment that the appellees had power to enforce this threat by reason

of the closed shop agreement with the contractors and upon the further allegation that the appellees neglected to report or to turn over to Local 39 of the International Union all of the money collected, as required by the rules of those organizations.

But as is apparent from our discussion in the *Laudani* case, not every person or act falling within the literal sweep of the language of the Kickback Act necessarily comes within its intent and purpose. That language must be read and applied in light of the evils which gave rise to the statute and the aims which the proponents sought to achieve. When that is done the inapplicability of the Act to the facts set forth in the indictment becomes clear.

The statute grew out of an investigation of so-called rackets by a subcommittee of the Senate Committee on Commerce pursuant to S. Res. 74, 73d Cong., 2d Sess. This investigation "revealed that large sums of money have been extracted from the pockets of American labor, to enrich contractors, subcontractors, and their officials." S. Rep. No. 803, 73d Cong., 2d Sess. It was found that laborers, especially those pursuing the building trades, often were paid the prevailing rate of wages but were compelled by their employers to give back or kick back a percentage of the pay which they had lawfully earned and received. Discharge was threatened unless they complied with the demands for kickbacks. The employers were thereby enabled to evade the scale of wages imposed by the Government on its construction projects, to the detriment of the workers. Such was the evil at which the Act was directed. At stated by the House committee in reporting the bill that became the law, "This bill is aimed at the suppression of the so-called 'kick-back racket' by which a contractor on a Government project pays his laborers wages at the rate the Government requires him to pay them, but thereafter forces them to give back to him a part of the wages they have received." H. Rep. No. 1750, 73d Cong., 2d Sess.[3]

[3] Senator Copeland, in charge of the bill in the Senate, explained its purposes as follows: "I should be unwilling to have the bill passed without the Senate understanding its purpose. Much has been said on the floor recently about what is known as the 'kick-back' where employer or sub-employers have indecently and immorally taken from employees a part of the wage which it was supposed they were being paid. The testimony before our committee investigating crime is so startling as to indicate that as much as 25 percent of the money supposed to be paid out of Federal funds for employment is actually repaid to employers in this improper manner. The purpose of the bill it to attempt to put some check upon that practice." 78 Cong. Rec. 7401.

It is thus apparent that the purpose of the Act is to insure that workers on federal projects shall receive the full wages to which they are entitled from their employers, many of whom had been found to be depriving the workers of their rights in this respect. And the sanctions of the Act are directed toward that problem. There is nothing in the legislative history to support the thesis that the statute was intended to affect legitimate union activities. Nor was it intended to be used to punish unlawful acts, including those committed by union officials in violation of union rules, that are not in the nature of kickbacks.[4] We need not here attempt to delineate the degree, if any, to which the Act

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Senator Copeland also quoted from a letter from Mr. William Green, President of the American Federation of Labor, stating, "It has been a common practice for contractors constructing Federal buildings to pay the employees the prevailing rate as determined by the Secretary of Labor, and then have them return a certain amount to the contractor. This is a most vicious practice." *Id.*

Representative Sumners, the chairman of the House committee in charge of the bill, referred to the bill as follows: "May I suggest to gentlemen on both sides of the House that we are going to attempt to call up on the first opportunity S. 3041, which is known as the 'kick-back' bill, preventing contractors from compelling workmen to return a part of their salaries." 78 Cong. Rec. 10521.

[4] The United States points to certain isolated references in the legislative hearings concerning dishonest union practices. Hearings, Subcommittee of Senate Committee on Commerce, S. Res. 74, 73d Cong., 2d Sess., Vol. 1, pp. 35, 82, 808, 814, 826. But these relate to general "racketeering" in labor unions or to connivance between union officials and contractors on the matter of kickbacks, neither of which is involved in this case. Thus Adolph Dzik, attorney for the anti-racketeering committee of the American Federation of Labor building trade unions in New York, testified as follows (*Id.*, pp. 808, 814):

> Mr. Daru [counsel for Senate Subcommittee]. Do you think it is usually a dishonest contractor or an employee, superintendent or otherwise, who is sandwiched in between there and getting the "kickback"?
>
> Mr. Dzik. I think it is the contractor and some of the officials of the unions.
>
> The Chairman. Is it your opinion that there is connivance between the contractor or his representative and certain officials?
>
> Mr. Dzik. I think so.
>
> . . . . . .
>
> The Chairman. I take it from what you say that you are placing responsibility largely upon the contractors, or do you also include in your criticism, collusion between the contractors and the officers of various unions?
>
> Mr. Dzik. I will say that primarily the contractors themselves are responsible, and that they corrupt the officials of the unions and in that manner are able to do it without being exposed. I will tell you why I say that, Senator. I say that if the officials and labor unions were really interested in this racket, they would immediately pass a resolution suspending the operation of the rule of the union punishing the laborers that exposed it.

See 46 Col. L. Rev. 326.

applies to the activities of trade unions and their officers. Nor need we question the fact that such officers on occasion may make unwarranted use of their powers, thereby reflecting adversely upon the reputation of unionism. It is enough to note that this Act was designed solely to prevent workers from wrongfully being deprived of their full wages and that evils relating to the internal management of unions were matters with which Congress did not concern itself in enacting the Kickback Act. Accordingly the broad language of the statute must be interpreted and applied with that background in mind.

From a superficial standpoint, the facts in the indictment would indicate that the appellees did induce the laborers to give up part of their lawful wages by threatening to procure their dismissal. But the facts as charged must be considered in light of the closed shop agreement between the appellees and the contractors. That agreement, so far as appears, was a lawful one, giving the appellees the power as union representatives to insist that all laborers be or become members of Local 39 and the International Union. The initiation fee which was assessed is a normal and usual assessment by a union on a person seeking a union job or membership in the union. There is no claim in this instance that the fee was unauthorized, excessive or otherwise improper; in fact, it is admitted that when the full amount of the initiation fee was paid the laborer became enrolled as a member of both Local 39 and the International Union. The indictment is directed only to those payments made by laborers who discontinued working before they paid the last installment. As to such installments, there is no allegation that the failure to return them was unauthorized by union rules or was in any other way unlawful. Moreover, the fact that the assessments were accompanied by a threat and a power to procure dismissal for failure to pay is but an ordinary incident of the apparently legal closed shop agreement. The sum of these facts, therefore, fails to reveal any of the evils which gave rise to the Kickback Act. All that appears are the normal methods used to implement the legitimate objective of a closed shop. The District Court so viewed the facts. It interpreted the indictment as dealing only with ordinary union initiation fees rather than with kickbacks, as that word is used in the context of this statute. We are bound by that interpretation on this appeal. *United States* v. *Borden Co.*, 308 U. S. 188.

The crucial fact relied upon by the United States, however, is the alleged failure of the appellees to report or to account to the unions as to those payments made by laborers who quit before making the last installment. But if that fact be true it cannot operate retroactively to make the assessments illegal or to give them the character of kickbacks. It must be assumed from the indictment as construed below that the assessments were lawful when made and that the appellees had the right to make them on behalf of the unions. If the appellees thereafter converted the money to their own use in violation of union rules, the evil falls outside the scope of the Kickback Act. Embezzlement and failure to obey union rules are matters vastly different from an unlawful demand upon an employee to return part of the wages he has earned. Congress has given no indication in this Act that it desired to deal with such matters.

The interpretative process would be abused and the legislative will subverted were we to deal with the broad language of this statute in disregard of the narrow problem of kickbacks which Congress sought to remedy. See *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Chatwin* v. *United States*, 326 U. S. —. The judgment of the District Court must therefore be

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 474.—October Term, 1945.

The United States of America, Appellant, *vs.* Joseph L. Carbone, Vincent Di-Nunno, John Stropparo and Wantee Huhtaniemi.	On Appeal from the District Court of the United States for the District of Massachusetts.

[March 25, 1946.]

Mr. Justice Frankfurter dissenting, with whom Mr. Chief Justice Stone and Mr. Justice Burton concur.

Until 1907 no review could be had from a judgment of a district—or the predecessor, circuit—court setting aside an indictment. By the Criminal Appeals Act of that year, 34 Stat. 1246, 18 U. S. C. § 682, this Court was given jurisdiction to review such a judgment, but only if the decision of the district court was based exclusively upon the invalidity or construction of the statute which gave rise to the indictment. If the district court construed an indictment as well as a statute, this Court could not entertain the appeal. *United States* v. *Hastings*, 296 U. S. 188. Accordingly, when the dismissal of an indictment involved an erroneous ruling in whole or in part upon the sufficiency of the indictment as a matter of pleading, the United States was without remedy. The upshot was that justice might be thwarted through a misconception by a district judge of the requirements of criminal pleading because time might bar a new indictment.

It was the purpose of the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. IV § 682, to meet this situation. This Act authorized the Government to appeal to a circuit court of appeals from the decision of a district court in those cases where direct appeals to this Court do not lie. It also required this Court to remand to a circuit court of appeals a case wrongly brought here. Accordingly, when the terms of the dismissal of an indictment by a district court raise doubts as to the ground on which the dismissal was made, or is a blend of a finding of bad pleading and of a con-

struction of the statute on which the indictment was based, this Court since the 1942 Act, is under duty not to affirm the district court but to remand the cause to the circuit court of appeals for that court's disposal of both issues—interpretation of the indictment and construction of the statute.

The Court applied this procedure in *United States* v. *Swift & Co.*, 318 U. S. 442, although, or perhaps because, there was a division here as to the meaning of the District Court's action. This course, in my judgment, should now be followed. The scope of the opinion below is certainly not unequivocal. Did the District Court mean that the indictment charged that the defendants acted exclusively as authorized agents of the union in collecting fees, but converted those fees to their own purposes? That may well be embezzlement under the Massachusetts law; but no one would contend that it comes within the terms of the "kick-back" statute. Or, did the District Court read the indictment to mean that that which the defendants did was outside the scope of their authority as union officials and was not done on behalf of the union, and hold that the "kick-back" statute does not apply to persons because they are officers of a union? Or, did the District Court read the indictment to mean that the union officials acted on their own and not for union purposes, but hold that such conduct is not covered by the "kick-back" statute because it applies exclusively to persons who work for the employer and who line their pockets by virtue of their power to assure or withhold employment? Instead of starting with an unequivocal construction of the indictment by the District Court, this Court is itself in effect construing the indictment when Congress has withheld from this Court the right to construe indictments.

In view of such doubts concerning the real meaning of what the District Court did, fair administration of the criminal law would seem to preclude affirmance of the judgment below on the assumption that the District Court read the indictment so as to bring into application a construction of the "kick-back" statute for which the Government does not contend. I would dismiss the appeal and remand the District Court's judgment to the Circuit Court of Appeals for the First Circuit for that Court to review the judgment in view of the power of the Circuit Court of Appeals, not possessed by us, to construe the indictment as a preliminary to construing the statute.

But under the compulsion of the Court's decision the case is before us on the merits. See *Helvering* v. *Davis*, 301 U. S. 619, 640. The statute seems to be clear: "Whoever shall induce any person employed in the construction, . . . of any . . . work, . . . financed in whole or in part by loans or grants from the United States, . . . to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined . . . or imprisoned . . . or both" 48 Stat. 948, 40 U. S. C. § 276b. No legislative history is invoked to undo the scope of this language and to immunize what Congress has plainly condemned. What Congress has enacted should be enforced. The statutory phrase is "by any other manner whatsoever." The indictment does not describe a check-off or collection of union dues or initiation fees in a labor union. That, as the Government agrees, is not prohibited. The statute seeks to protect forays against wages derived from federal funds and does not touch diminution of such wages in connection with union membership. The statute is for the protection of the laboring man and the taxpayer. It should be so interpreted and enforced. It should not be interpreted so as to protect those described in the indictments as collecting funds by coercion, through their control over jobs, for their own personal advantage at the expense of the wage earner, the labor union, and the taxpayer.